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IN THE MATTER OF THE HUMAN RIGHTS CODE OF ONTARIO

and

IN THE MATTER OF THE COMPLAINT OF CAROL SHAW
ALLEGING HARASSMENT IN THE WORKPLACE BECAUSE OF SEX BY
LEVAC SUPPLY LTD., ROGER LEVAC AND HERB ROBERTSON

APPEARANCES

Naomi Overend
Catherine Bickley

On behalf of the Ontario
Human Rights Commission

David John McMurray

On behalf of the Respondents
Levac Supply Ltd. and
Roger Levac

Gary W. Tranmer

On behalf of the Respondent
Her Robertson

DECISION

PART ONE - INTRODUCTION

This inquiry concerns the complaint of November 4th, 1987, as amended on the 15th of June, 1989, made by Carol Shaw against Levac Supply Ltd., Roger Levac and Herb Robertson. In her complaint Ms. Shaw alleged that over the course of some fourteen years of employment with the respondent Levac Supply Ltd. she was harassed in the workplace by Mr. Robertson, a fellow employee, because she is a woman, thereby infringing her right to freedom from such harassment in contravention of sections 6.-(2) and 8 of the Ontario Human Rights Code, Statutes of Ontario, 1981, Chapter 53, as amended (hereafter referred to as "the Code"). She also alleged that Roger Levac, who was in charge of the operations of the company, having been informed of this harassment on numerous

occasions and having done nothing effective to put a stop to it, thereby contravened her rights under these provisions as well. The complaint also alleges that Levac Supply Ltd. is responsible as their employer for such contravention of the Code.

At the hearing it was contended on behalf of the complainant by the Ontario Human Rights Commission (hereafter referred to as the Commission) that these infringements of her rights were engaged in wilfully or recklessly, causing mental distress and migraine headaches and, ultimately, driving her from her employment with consequent financial losses amounting to \$43,273. Compensation for those losses is sought, along with an award in the amount of \$7,000 in respect of the mental anguish endured, pursuant to section 40.- (1)(b) of the Code.

The relevant provisions of the Code are as follows:

6.-(2) Every person who is an employee has a right to freedom of harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

8. No person shall infringe or do directly or indirectly, anything that infringes a right under this Part.

9.-(1)(f) "harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

40.-(1) Where the board of inquiry, after a hearing, finds that a right of the complainant has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

The provision upon which all else depends is subsection 6(2) and, as pointed out in Cuff v. Gypsy Restaurant and Emile Abi-ad

8 C.H.R.R. D/3972, at D/3980 ff., that section creates four conditions that must be met for conduct to amount to harassment under the Code. (See also Boehm v. National System of Baking Ltd. (1987), 8 C.H.R.R. D/4110, at D/4124, para. 32565.) In order to find that Mr. Robertson infringed the complainant's right under that section it must be shown (a) that his behaviour towards her, whether by way of comment or conduct, or both, (b) involved some degree of repetition (c) which was in fact annoying, distressing, troubling or agitating (in short, "unwelcome") to the complainant, and that (d) he knew or ought reasonably to have known that this was the case. Unless Mr. Robertson's conduct amounted to such harassment and was engaged in "in the workplace because of sex", none of the respondents can be found liable.

The argument of counsel for Mr. Robertson was based entirely on his assessment of the evidence. He contended that the testimony of the complainant was contradictory, self-serving, evasive and inconsistent with that of other witnesses, including those called on her behalf - the credibility of some of whom he sought to impugn. He asserted that, however one chose to characterize Mr. Robertson's behaviour, there was no direct evidence that it was aimed at the complainant because she was a woman, and no inference to that effect could reasonably be drawn. Moreover, it was his position that even had his client harassed Ms. Shaw because of her sex, his conduct did not cause her to leave her employment with Levac Supply.

Counsel for Mr. Levac and Levac Supply (hereafter referred to as counsel for Mr. Levac) argued that, even if it were found that Mr. Robertson had infringed sections 6.-(2) and 8 of the Code (which he denied), it could not be found that Mr. Levac had done so since his conduct was not in itself harassment, nor was he aware that Mr. Robertson had harassed the complainant at all, let alone because of her sex. He also contended that there can be no vicarious liability for such harassment and that Levac Supply could only be liable if, in accordance with the so-called organic theory

of corporate liability, the harassment was engaged in by a person who was a "directing mind" of the company. As Mr. Robertson was not such a person and Mr. Levac had not engaged in such conduct, the corporate respondent could not be liable either.

PART TWO - THE LIABILITY OF THE RESPONDENT MR. ROBERTSON

Although the particulars of Mr. Robertson's conduct and its assessment in the light of sections 6.-(2) and 9.-(1)(f) must be dealt with before addressing the possible liability of the other respondents, I have found it impossible to separate the evidence surrounding that issue from that which relates more directly to issues concerning the other respondents. A major source of that difficulty is the contentions made respecting credibility which must be disposed of before any conclusions may be drawn.

I. WAS THE CONDUCT HARASSMENT?

Levac Supply Ltd. (hereafter referred to as Levac Supply) is a small company located in Kingston which carries on business as a seller of various industrial supplies to manufacturers and others involved in wholesale business. The shareholders of the company are Roger Levac (Secretary), his wife Shirley Levac (President) and their children (all of whom are directors). However, it was clear and uncontested that Roger Levac has always exercised full control over virtually every aspect of the company's operations, including personnel matters, and is regarded by everyone connected with this family-owned enterprise as the "boss" (to use his term).

When Carol Shaw commenced her employment with Levac Supply in or about March of 1973 the work assigned to her was primarily of a bookkeeping character, with particular emphasis on the accounts receivable of the company. For all but a short interval towards the very end of her employment at Levac Supply her work station was located in a medium-sized room referred to as the "general office". In addition to other smaller office spaces located in the building there was a very large "front room" with a long counter at the entrance where the sales personnel processed orders and behind

which were located numerous shelves holding merchandise. The configuration of office spaces and the location of the personnel went through a number of phases over the years in question. These changes will be referred to where relevant.

Through the initial years of her employment Ms. Shaw shared the general office with the "office manager", Herb Robertson, whose duties would seem to have included overseeing the flow of office work. Sometime in 1982 Ev Millward, who worked for the company from 1969 to 1987 in a basically clerical capacity, was relocated from the outer or front office to a desk in the general office where she remained until she retired from full-time employment in 1984. Marg Malloch was hired on a full-time basis in 1986 and given a desk in the general office. It would seem as well that during the 1980's Terry Levac and Gaetan Levac were at times stationed in the general office. Employees working elsewhere in the building frequently had occasion to go into the general office where most of the files and various documents were located. Thus, while much of what Ms. Shaw complains about occurred when she and Mr. Robertson were alone in the general office, others had ample opportunity to observe the situation and a number of witnesses were called to give evidence in this regard.

Despite his title, Mr. Robertson would appear to have had no actual authority over other employees, but it is not clear whether he fully appreciated that limitation. While Ms. Shaw at no time considered Mr. Robertson to be her supervisor in any sense, it was her impression that he had had a supervisory role over both Ev Millward and Marg Malloch (see transcript of evidence and argument, volume 1, pp. 45 and 96; these documents will be referred to hereafter by volume and page number only). Although Ms. Millward had not regarded him as her supervisor (v. 2, p. 117), Ms. Malloch thought that Mr. Robertson had some sort of supervisory relationship to her, and she referred to him as being "a superior". However, in response to the questioning of Mr. Levac's counsel, she qualified their relationship as being in respect only of the actual

work to be done. (V. 4, pp. 99, 105, 107).

For his part, Mr. Robertson claimed to have had supervisory functions which he said extended to the complainant. Since he was "responsible for her ... and making sure that [her work] was done", it was his view that he had a "supervisory role over" Ms. Shaw. "I just thought that was part of my duties as the office manager, being responsible for people in the office and the work being done in the office". (V. 4, at 143-44.) However, Mr. Levac regarded them as "equals", as being "on the same level". Indeed, when Ms. Shaw left the company her hourly rate of pay was actually slightly higher than that of Mr. Robertson. (V. 4, p. 211.)

According to Ms. Shaw, the initial relationship between her and Mr. Robertson was "friendly" and "good". He was both helpful and complimentary. However, a few months after starting her job she found him "less friendly" and uncommunicative. Although she tried on many occasions thereafter to initiate conversations he would not respond except in the most perfunctory way when circumstances required.

The harassing conduct of which Ms. Shaw complains is alleged to have commenced about the time that this change in attitude was observed. That conduct is said to have consisted of the whistling of particular tunes and the making of noises and comments which, while not usually expressly addressed to her, were in all the circumstances clearly aimed at the complainant. That there were such occurrences, and that they were in fact aimed at Ms. Shaw, is confirmed by Mr. Robertson's own testimony, as will be seen when the question as to why he had so behaved is examined.

The Complainant's catalogue of instances of Mr. Robertson's harassing conduct began with her account of his whistling of the tunes "Slow Down, You're Moving Too fast" and "The Games People Play". On other occasions he would say to no one in particular, but in her hearing as she was working, "games, games, games", or "stare at it, stare at it". It was her impression that he whistled

those tunes and uttered those words in order to imply that she was working slowly or incompetently. Ms. Shaw's testimony in this respect is corroborated in a material particular by that of Ed Beaudrie (v. 2, p. 88) and Marg Malloch (v. 4, p. 109).

Ms. Shaw, who described herself as heavy set, said that Mr. Robertson made personal comments about her, recalling specifically his having referred to her and Ev Millward as "fridge sisters". Rod Irwin, one of the Commission's witnesses, testified that Mr. Robertson was given to making snide remarks about the complainant behind her back. When asked if he could recall any specific comment he replied:

I can remember one where he came out to the warehouse and said something to the effect "The fat cow screwed up again." Maybe not exactly in those words, but something to that effect. ... I remember "fat cow". ... I remember that one. There was probably more, but I just can't remember them. ... They were basically all very sarcastic and very insulting. (V. 2, pp 47-48.)

Since it was not alleged that the words "fat cow" were said to or in the hearing of Ms. Shaw, their use would not constitute part of any harassment; but this evidence is corroborative of the complainant's testimony as to Mr. Robertson's proclivity to indulge in offensive comment.

Counsel for Mr. Robertson suggested that this evidence was not to be believed because Marg Malloch, a witness called by him, had never heard the respondent use the expression "fat cow" and thought that it would be out of character for him to do so. She said that "Herb can be pretty cutting, but he's not rude". (V. 4, p. 99.) Having regard to other things she admitted having heard him say, her judgment as to what is rude may not be generally shared. In any case, the fact that Mr. Robertson never used that expression in her hearing does not prove that he did not say it in the hearing of the witness who affirms having heard it.

In this same vein, another witness, Peter Van Order, made the following statement regarding offensive comments made by Mr.

Robertson, much of it within the hearing of the complainant:

... there seemed to be quite a bit of tension in the [general] office and Herb was always making derogatory remarks. ... One thing he did quite a bit was - Carol's desk was in front of him and he was always snickering. He was always watching Carol when he did it. And he'd snicker and go "Yea, Yea" or, when Carol left the office, quite often when she just -- in front of her desk there was a little spot to hang coats and when she got out behind it he would say out loud "Horse, Horse. Neigh, Neigh". [The witness did not say the word "neigh", but made a neighing sound.] And at other times, when he was going out of the office, when he got past, just outside the door, or Carol did, he'd always yell "Insecurity, Insecurity". [To the question "Could Carol hear what he was saying? he replied, "Oh, yes." And when asked how many times he remembered such incidents he replied "I'd say just about every day there would be something".] (V. 4, pp.3-15.)

Counsel for Mr. Robertson sought to discredit that evidence on the basis that, had it been accurate the complainant in her own testimony would certainly have referred to the specific comments allegedly made, as would Mr. Taylor and Rod Irwin had they heard it, as the witness indicated to have been the case. However, I do not find it surprising that the complainant would not recall every specific comment, gesture or other insulting episode that occurred over a period of some fourteen years; nor is it surprising that the remarks and conduct that remain in his memory would include matters not adverted to by the complainant or the other witnesses in their prior testimony. Had they been asked, they might have remembered; in any case, their failure to mention hearing the specific comments testified to later by Mr. Van Order does not in my view depreciate his testimony. I found no reason to question the credibility of these two witnesses. In the light of the whole of the evidence their statements were certainly neither improbable nor unreasonable, nor were they contradictory of other evidence. Nothing arose in the evidence to cast discredit upon them. Despite the unsupported suggestion to the contrary made in argument by Mr. Robertson's counsel in respect of Mr. Van Order, there was nothing

in their demeanour while testifying that would suggest untruthfulness. Although Rod Irwin stated that he had left the company "basically [because] I found it extremely hard to work for Gaetan Levac [Roger's nephew]" (v. 2, p. 42), he had never had any problems with Roger Levac and confirmed that he harboured no feelings that would affect his testimony. He was not cross-examined in this respect.

Ms. Shaw's testimony dealt with other instances of insulting behaviour by Mr. Robertson which, as shall be seen, were alleged by the Commission to have been calculated to demean her as a woman. Frequently as she walked about in the office he would say to no one in particular "waddle, waddle, waddle". At other times, if she were wearing nylons, he would say "swish, swish, swish" instead. She found this degrading and upsetting, and said that it gave her a "complex" such that she stopped walking in the office if she could possibly avoid it. She said that such incidents often occurred when they were alone, indicating that they must have been aimed at her. That he said these things was corroborated by others, including Marg Malloch, who testified that she heard him make a "swishing" sound when Ms. Shaw walked about the office. She said that she also heard him "occasionally sing little songs like "Slow Down, You Move Too Fast". (V. 4, p. 109.) Although Ms. Malloch referred to this as "teasing", she admitted that the complainant "did not look like she was enjoying it".

Ms. Shaw testified that Mr. Robertson's offensive conduct included mimicking her sarcastically, and she gave as an example his derisive use of certain phrases she employed, such as "I must have been away" and "I must have been on holidays". She said that Mr. Robertson was given to making insinuations of incompetence on her part when a document someone was looking for could not be found immediately, and so she began disclaiming responsibility in such situations by pointing out to the person making the request that she had been absent.

Another instance of such lampooning related to her offering of assistance to others by saying in a pleasant tone "I'll do it for you if you like", or "I'll do it". She claimed that Mr. Robertson began using those phrases "with great sarcasm, really drawn out", and she regarded this parodying of her mannerisms as an integral part of his disagreeable conduct.

The complainant also testified that Mr. Robertson took to "checking up" on her. Even though it was no concern of his, he would time her phone calls and follow her nearly every time she left the general office in order, she felt, to "check up" on her; and this went on for a period of about ten years. (V. 1, p. 70.) This aspect of his conduct was confirmed by Reg Taylor, one of the Commission's witnesses, who said that "... if Carol came out to the front, to where the counter is, Herb would follow her out and again, little comments". He said that this happened with a fair degree of regularity. (V. 2, p. 69.) Ev Millward also said that she noted "a few times if Carol went out of the office to check on something Herb would follow through on it to find out what she was doing". (V. 2, p. 115.) Regarding these episodes Ms. Shaw said that on occasion, after following her when she had gone to see someone elsewhere in the building, Mr. Robertson would walk past and say something like "surprising how many people you can fool when you walk around with papers". (V. 1, p. 75.)

Ms. Shaw further complained of having heard that Mr. Robertson had at times told others that she had taken an excessive length of time to do a particular job when it was neither true, nor any of their business. That he made derogatory remarks behind her back was confirmed by Rod Irwin.

According to Ms. Shaw, after she broke her ankle in September of 1986 the following was added to Mr. Robertson's list of oblique taunts made when he was talking to others in her hearing: "Limp around and you'll probably get sympathy". (V. 1, p. 107.)

A final kind of harassing behaviour which the complainant

asserts that Mr. Robertson indulged in related to her children. She said that he would often "make implications about my children", such as "some kids need Mummy to wipe their nose for them". She said that he did this in the context of conversations with others in which he would indicate that "his wife was at home with their kids, and that was a statement that he often made and said on occasions when my kids would phone me at work , but ... the way it was said, and deliberate, you knew that it was directed at or for you". (V. 1, p. 79.)

Reginald Grodee, another witness called by the Commission, was very vague as to the specifics of the "snide" remarks he said he heard Mr. Robertson make in respect of the complainant. The kind of comment he recalled evidently related to their work:

Carol would maybe come in just a bit late or something and Herb would say, "Well, you know, what happened? What did you do last night? or "Where were you last night?" just in a snotty way and, you know I don't think it was called for. ... [And, regarding the quality of her work he heard such comments as] ... You can't do this right" or "You didn't do that right" or "this is wrong" and "That's wrong", "It's not done the way I do it" type of thing. (V. 2, p. 34 ff.)

Mr. Grodee went on to say that this "was just the Herb Robertson way", that he would speak to everyone that way, and that when he (Mr. Grodee) was the butt of such remarks he would "let it roll off like water off a duck's back". However, he had seen the complainant leave such encounters "with almost tears in her eyes ... with her eyes all swelled up".

While Mr. Grodee's evidence did nothing to advance the contention that the complainant was harassed because of her sex, neither does it indicate that Mr. Robertson's conduct was normal bantering which only the hypersensitive would resent. Even if all the comments Mr. Grodee overheard were work-related, and assuming her performance left something to be desired, it was not up to Mr. Robertson to reprimand or reproach Ms. Shaw. However, it is to be noted that Mr. Grodee's evidence does speak to the effect that Mr.

Robertson's conduct had upon the complainant.

It was the respondent's position that he did not single Ms. Shaw out as the object of his "needling", but treated her in the same way as everyone else (namely, in "the Herb Robertson way"), and Mr. Grodee was not the only Commission witness cross-examined on that point. Mr. Irwin acknowledged that the respondent was "a joker or a teaser and he'd needle people" (v. 2, p. 55), but "the snide remarks that he made to Carol, you could tell that he wasn't joking around ..." (v. 2, p. 51); "there was no one he needled the way he needled Carol" (v. 2, p. 57). In cross-examination Mr. Taylor agreed that Mr. Robertson indulged in needling his fellow workers, both male and female, and that "sometimes he'd take the needling further than you thought he needed to". (V. 2, p. 80.) Ev Millward agreed that Mr. Robertson was "a teaser or needler", but she said that the sarcastic remarks he directed at Carol were different. "When it was to be a comment against Carol -- well, not specifically aimed at Carol, but said about Carol, it was not done in a joking way". (V. 2, p. 126.) When asked whether he agreed that the respondent "would needle everyone, male or female, in the office", Mr. Van Order replied "Yes. I wouldn't -- I don't call this needling what he was doing with Carol, but yes, he used to tease everybody". (V. 4, p.13.)

The witnesses called on behalf of Mr. Robertson all testified as to his penchant for teasing. Gaetan Levac, a Francophone of not particularly slender proportions, said that Mr. Robertson, who often called him "skinny" and a "dumb Frenchman", frequently "poked fun" at those around him and that it was taken in good fun. He did not observe any difference in the way the respondent treated women in this regard.

Julie Slack, a young woman who grew up next door to the Robertsons, said (without furnishing examples) that "he jokes around here and there, but it was always in good taste". (V. 4, p. 69.)

Susan Saunders, a close friend of Mr. Robertson who sang with him in the church choir, said that he teased her even in public about her being considerably overweight, such as by inviting the audience to give any sandwiches they had left over "to this poor little girl up here because she hasn't had much to eat and you can tell by looking at her she might need something to eat." She said that he not only teased other members of the choir, but even relative strangers for whom they were singing, or people he had just met. His teasing did not "fizz" her because she is "secure as a person and as a woman". (V. 4, p. 84.)

Marg Malloch, who continues to work for Levac Supply, found Mr. Robertson "very joking and funny". He "poked fun" at everyone, but "mostly everybody just brushed it off and went along with it or gave it back to him." She said that on occasion when she "did something stupid in the office" he might comment that "Well maybe it's the hair colour". When asked how she reacted to that comment, this very blonde witness said "Well, I made the mistake so I was kind of stupid to have made it". (V. 4, p. 98.) She did not find any difference in the way he treated men and women but, as already noted, she did see a difference in the effect that Mr. Robertson's behaviour had on Ms. Shaw, whose discomfort must therefore have been quite clear.

Father Byrne, his parish priest, testified that at their first encounter Mr. Robertson made some sarcastic remark at which he took offence, causing him to end their conversation and leave. However, some time later they were thrown together in certain parish work and Father Byrne came to see that what he had taken offence at was simply the respondent's way of dealing with people. It was his opinion that Mr. Robertson often pursued this kind of behaviour further than he should have for the sake of good relations.

The complainant's evidence was that this conduct began within months of her commencing at Levac Supply and grew progressively worse over the ensuing fourteen years, becoming particularly

unbearable during the final months of her employment there.

Ms. Shaw never attempted to retaliate in kind, as all the other witnesses confirmed. She felt that she was no match for Mr. Robertson at verbal sparring. Although she tried to ignore his conduct and not let on that it bothered her, some two or three times a year she would lose her temper and tell him to leave her alone, to "get off her case", to "get off her back". There was some corroboration of this in the evidence both of Mr. Taylor, who once heard her tell him to "shut up", and of Mr. Van Order. The latter recalled an occasion when Mr. Robertson was snickering and Ms. Shaw turned and told him to "fuck off and leave me alone". When driving home after that incident with him and another employee, Mr. Robertson, who obviously had no cold, sniffled and said "I've got a bad cold, and yet I'm told to fuck off and leave me alone". (V. 4, p. 10.) And on one occasion some two or three months before she resigned Ms. Shaw became so distraught that she threw a "highlighter" pen at Mr. Robertson. He confirmed the event, as did Marg Malloch.

Ms. Shaw's account of this particular incident was regarded by counsel for the respondent as being indicative of her general evasiveness and the inconsistencies between her testimony and that of others. I cannot agree either with that assessment of this specific event, or with the generalization in question.

Ms. Shaw was asked by counsel for the Commission whether she "remembered doing anything besides using words" to indicate to the respondent her displeasure at his conduct. She replied, "Oh, the last time I said something to him to the effect that I didn't like his harassment and threw a highlighter pen at the same time [in] his direction, which was his desk behind. I was sitting at my desk". The pen did not hit the respondent. (V. 1, p. 84.) In his cross-examination of the complainant, counsel was unsuccessful in getting her to recall what it was that Mr. Robertson had said that provoked that reaction, and he submitted that she was being evasive

because Mr. Robertson had said nothing to or about Ms. Shaw on that occasion, as he suggests was confirmed both by the respondent and by Marg Malloch, who witnessed the occurrence.

Ms. Malloch's evidence regarding this event was that she was about six feet away from the respondent, who was "standing at the filing cabinet talking and laughing [with Terry Levac]. I didn't hear what they said. And all of a sudden this magic marker came flying across the room", thrown by the complainant from a distance of "I don't know, 12, 14 feet". (V. 4, p. 103.) In confirming this incident the respondent said that he and Terry Levac were simply "kibitzing back and forth and all of a sudden this highlighter came flipping through the air and over my desk". (V. 4, p. 157. Emphasis added.) Counsel did not call upon Terry Levac to confirm Mr. Robertson's assertion that the kibitzing had nothing to do with Carol Shaw. In any event, he suggests that, since Marg Malloch could not hear what was said, neither could the complainant who was farther away, and therefore Ms. Shaw's evidence on this point is at best evasive and inconsistent. He put that forward as part of a pattern through which to discount the complainant's evidence. However, Mr. Robertson's desk and the filing cabinets were at opposite ends of the office, and his evidence actually confirms the complainant's statement that he was at his desk at the time. Are they both mistaken? Or is Marg Malloch mistaken? But even if their relative locations were as this witness testified, it does not follow that Ms. Shaw could not have heard what the men were saying simply because Ms. Malloch did not hear it. Perhaps Ms. Malloch's failure to have made out what was said was because she was not paying particular attention; perhaps the complainant had become so sensitized to the abuse that she was listening for it.

In any case, under cross-examination (before Ms. Malloch's evidence was tendered) Ms. Shaw said that at the time "Herb was at his desk. He had been harassing me. I thought he was harassing me at the time. I got very upset and I turned around and I threw

a highlighter at him and probably at the same time told him to get off my case, get off my back, leave me alone". (V. 1, p. 174. Emphasis added.) The evidence shows that the complainant was subjected to invective daily, and there is nothing evasive in her inability to remember whether in fact she was being talked about at the very instant she threw the pen, much less exactly what was said. Her evidence was that she had already been harassed that day and, believing herself to be the subject of the laughter and "kibitzing", she reacted in the manner described. The point is that she undoubtedly threw the pen, and the question is, Why? Such outbursts were entirely uncharacteristic, and no explanation for her conduct on that occasion other than her own was advanced.

Ms. Shaw's account of his conduct towards her went on to indicate that Mr. Robertson's sarcastic, biting remarks and his derisive behaviour were repeated over and over again every day. Indeed, she said that on one particular day she counted thirty-six separate instances of such behaviour. As that assertion was also seized upon by counsel as a major instance of inconsistency and evasiveness on her part it, too, must be dealt with at some length.

Paragraph 8 of the amended complaint states that "As of May 1986, I counted thirty-six incidents of harassment ... by Mr. Robertson". Counsel obtained the complainant's acknowledgement that that wording implied a total of thirty-six incidents during the entire period preceding May of 1986, and he argued that this is a major inconsistency in her evidence. However, the complainant pointed out that this paragraph of the original complaint read "About year and half ago I counted 36 harassments ...", by which she had meant that she had made that count on one day, some eighteen months prior to signing the original complaint on November 4th, 1987. Although she had read and signed the amended complaint, that change in it escaped her notice, and she insisted that she had counted on a single day thirty-six separate incidents. Although she could not "give the text of each one", there was considerable repetition of such things as "waddle, waddle, waddle", "swish,

swish, swish", "stare at it". (V. 1, p. 168.)

Not only do I find Ms. Shaw's evidence on this point entirely credible, but the suggestion that she told the Commission of a total of thirty-six incidents over fourteen years and then sought to change her story to thirty-six on one day, impliedly in order to heighten its drama, makes no sense to me. Unless she had begun to keep an accurate count of these incidents from the beginning so that she could at any time look up her records (or consult a phenomenal memory) and report that up to any given point of time there had been "X" number of incidents, how could she possibly have known in June of 1987 the total number of incidents that had occurred between 1973 and May of 1986? And if she were inventing a total for a period in excess of ten years, why pick the paltry number of thirty-six? Moreover, why choose May of 1986 as the cut-off date? Why not include the incidents between then and June of 1987 during which time she says the situation worsened? The truth is obvious. She could never have had any idea as to the total number of times she was subjected to the respondent's misconduct over the years and could not possibly have purported to affix a firm number to them. The evidence of others corroborates her assertion that she was subjected to this behaviour virtually on a daily basis, and each of these days would likely have involved multiple instances. When one considers that there must have been close to 3,500 days that they worked together at Levac Supply, surely that is enough to establish that, despite the obvious error by the Human Rights Officer who wrote up the amended complaint, her reference was at all times in respect of one particular day.

Counsel wanted to know as well why she had not recorded the actual content of these thirty-six incidents and taken them to Roger Levac. She answered that she "had better things to do, or more important things, or more workload to do than to write down these harassments and what each one of them were". (V. 1, p.170.) She did not go to see Roger Levac about the incidents that occurred that particular day because her many other unsuccessful attempts

to get Mr. Levac to have a stop put to the conduct made it appear futile.

Counsel argued that if the respondent's conduct was as traumatic as she had tried to make out she would have taken the time to record these thirty-six events as a matter of personal importance, and she would have complained to Mr. Levac that very day. However, this line of argument wrongly assumes that Ms. Shaw raised the episode of "thirty-six incidents in one day" as the zenith of her ordeal, as though the very number were in itself an added gravamen of unusual proportions. But that is not the context of her assertion. She had made it clear that the harassment was daily and frequent and, to indicate just how frequent it was, she said that she happened to have counted thirty-six incidents on one day. She did not indicate that it had been a particularly bad day at the end of which she reconstructed events and tallied up the numbers. She explained that she had simply decided one day to keep track of the number of times Mr. Robertson affronted her. To that end she used the common system of four vertical lines through which a cross-line is drawn when the number five is reached, the vertical lines then recommencing. At the end of the day she added them up and thought to herself, "thirty-six times!" She then threw away the paper and went home. What stayed in her mind was "thirty-six". And there is no evidence that that number was of such particular quantitative significance relative to those occasions when Ms. Shaw did complain to Mr. Levac that her failure to do so on that day in May of 1986 casts a pall of doubt on her credibility.

The evidence leaves no doubt that Mr. Robertson's "digs" at times drove the complainant to tears, as she attested. Besides Mr. Grodee, whose observations in that regard have been noted, two others testified to the fact that he reduced Ms. Shaw to tears, and other evidence already reviewed shows that her discomfort was a matter of general knowledge at Levac Supply. Ed Beaudrie said he saw Ms. Shaw leave crying quite a few times and, when he asked others what the trouble was, he was told that "Herb was on her

"case", or "it's Herb again". (V. 2, pp. 99 and 106.) Reginald Taylor said he saw Carol crying on a number of occasions because "Herb was bugging her". He said that often she would come to work in good spirits and then become progressively depressed as the day wore on. While he acknowledged that this may have been caused by other things, such as problems at home, the respondent's behaviour was such as to be likely to produce such an effect and there was little in the evidence to suggest any other cause. (See v. 2, pp. 67 and 71). When questioned as to problems encountered by Ms. Shaw at home Gaetan Levac referred to mundane difficulties that are mankind's lot - even to her having complained to him once that when she got home there was no cold beer in the refrigerator. He was quite vague as to the effect upon her at the office of these occurrences to which he claimed she made him privy, but he said they were stresses that were bound to affect her, just as some of his personal problems affected him.

While Mr. Robertson admitted to "bugging" and "teasing" the complainant, he insisted that this was done simply in order to "get more productivity" out of her. When asked by counsel for the Commission whether his needling of Ms. Shaw "got the desired effect of speeding her up", he replied "initially it may have". Thus, he indicates that the effectiveness of this "management technique" (to use counsel's expression with which he agreed) was at best short-lived. Counsel then put this question: "And you continued needling and needling her over the next fourteen years?", to which he replied, "On and off I would assume so". (V. 4, p. 185.) He also said that "to the best of [his] knowledge" she never "complained to [him] about the way [he] was dealing with her". (V. 4, p. 150.) I accept the complainant's evidence that she told him with some frequency to "get off her case", "get off her back" to "leave me alone". That evidence was corroborated by others, and I find his denial that she complained to him unbelievable.

Prior to giving his own evidence Mr. Robertson had been present during the testimony of the complainant and all of the

witnesses called on her behalf. Not only did he admit to having "needled" the complainant but, except for one utterance that had been attributed to him, there was no denial of having done and said the various things ascribed to him by these witnesses. However, he emphatically denied having used the words "fat cow" in reference to Carol Shaw, because his "humour might be cutting or biting, but it's certainly not malicious". (V. 4, p. 154.) (It might be noted at this point that he had previously heard the expert evidence of Mr. Astrachan as to the possible significance of using that expression.) In that regard, I have already stated that I found no reason to doubt the credibility of the evidence of Mr. Irwin who was quite insistent on having heard the respondent use that expression in relation to the complainant. What I do not find credible is Mr. Robertson's suggestion that he did not use that expression because his humour is not malicious. I do not find the use of the term "fat cow" any more malicious than saying "waddle, waddle", "swish, swish" and "horse, horse" in the circumstances described at the hearing. I have no trouble concluding that a man who would do the latter would not refrain from saying the former.

Before concluding my consideration of the question whether Mr. Robertson's conduct amounted to harassment as defined in the Code I must deal more fully with the assertion that "the evidence of Mrs. Shaw is so evasive, so contradictory in itself and so contradicted by the other evidence that [one] cannot accept as proven on a balance of probabilities that any of it, as she alleges, occurred". (V. 5, p. 56.) I turn now to the many other inconsistencies, contradictions and incidents of evasiveness imputed by counsel to the complainant's testimony.

The first reference to Ms. Shaw's evasiveness was in respect of her April 14th, 1985, letter to Roger Levac (Exhibit 7). That letter was in response to a request made at a staff meeting that the employees "draft up a [confidential] letter, a summary or something, of what they thought about Levac Supply". (V. 1, p. 86.) The letter referred to the situation between her and Mr.

Robertson, went on to comment about other matters affecting the company, and concluded with her expression of hope to continue working there until retirement, followed by a postscript attesting to her esteem for Mr. Levac. When questioned by counsel for Mr. Levac regarding these comments the complainant kept referring to them as her "observations", and she seemed reluctant to agree with him that her comments were identifying problems. In the end, when it was pointed out that counsel was not asking whether Mr. Levac thought these matters were problems, but whether she thought they were, she said "I guess then, yes, I would say I saw them as a problem". (V. 1, p. 240.) In my view, she was confused, not evasive. As nothing hinged on whether her comments were taken to be "observations" or were regarded as stating problems, there would appear to have been little point in evasiveness even if she were so inclined.

Counsel for Mr. Robertson then referred to the complainant's letter of resignation of June 24th, 1987, which reads as follows:

I Carol Shaw, do hereby submit my resignation from Levac Supply. I will not tolerate any more harassment and degrading, mostly from Herb. I have brought this matter to your attention many times over the years but you chose to ignore the problem. A new position was offered by you to me two months ago. So far the only thing I have done towards moving to this new position is sat in on one sales meeting.

Also it bothers me to see the condition of the accounts receivable. The Journal sheets often don't balance because of errors now. The month end accounts receivable never balance right off. After finding many errors it comes close to balancing. There is no follow up done now on outstanding invoices. I could understand you wanting someone else learning the accounts receivable when I broke my ankle but I find difficult to understand how you tolerate the way the things are done now or should I say not done.

I have enjoyed working for you, with you and all the other employees with the exception of Herb, of course.

Call me and we will discuss the particulars of my

leaving.

During his cross-examination of the complainant counsel for Mr. Levac sought an admission from her that her letter stated more than one reason for her resignation. Both he and counsel for Mr. Robertson later argued that the "real" reason for her resignation was her unhappiness over changes to her workload. When asked whether she would disagree with the statement that there were several reasons why she resigned, the following exchange occurred:

- A. Yes, I would disagree with it. I wasn't happy in the other position or the way things were being done, but I couldn't take the harassment any longer.
- Q. So you are saying the matters in the second paragraph have nothing to do with your resignation?
- A. I would say no.
- Q. Then why raise them in a letter of resignation?
- A. Because, as I indicated before, I like Roger and I didn't like to see things undone or unruly. (V. 1, p. 230, 231.)

Counsel for Mr. Robertson asserted that the letter took but two lines to refer to the alleged harassment and then went on to deal at greater length with other concerns, and he described as evasive and self-serving her "insistence" that "the only reason I quit was harassment from Herb". (V. 5, p. 62.)

While it is clearly in the complainant's interest to establish that the reason she left Levac Supply was the harassment of the respondent, her evidence in that regard can hardly be called self-serving in any pejorative sense. Nor do I find this testimony evasive when the full context of events is considered.

Upon returning to work in September of 1986 after breaking her ankle Ms. Shaw was assigned different duties. According to Roger Levac the reasons for the change were to accommodate her condition, which made standing and walking about difficult, and to respond to

a newly perceived need that employees be capable of a diversity of tasks in order to fill in for each other as needs be. Gaetan Levac testified that the change had been suggested by him in part to relieve the tension between Ms. Shaw and Mr. Robertson by separating them, and Roger Levac agreed that that was possible. (V. 4, p. 257.) She was put to work learning word-processing at the computer, then located outside the general office, and Ms. Malloch continued to do the work she had taken over from Ms. Shaw while the latter was away on holidays and then convalescing. (For reasons that will be seen in another connection, it is important to note that at this time substantial renovations were under way, and it was clear that the computer was eventually to be located in the general office, as in fact it later was.)

It was the testimony of both Roger Levac and his nephew Gaetan that the company was then contemplating the creation of a new position dealing more directly with the salesmen (which position was eventually established some time after Ms. Shaw's departure), and they said that they had Ms. Shaw in mind for it. She testified as well that they had raised that possibility with her. It is that position, which would have removed her from the reach of Mr. Robertson's harassment, that is alluded to in the first paragraph of her letter. That reference is entirely consistent with her testimony, and it does not suggest to me an additional reason for her resignation. Indeed, quite the opposite.

Ms. Shaw made no attempt to disguise her unhappiness with her new assignment, and even prior to her letter of resignation she brought to Mr. Levac's attention these same observations regarding what she perceived as the inadequate state of the records, with "things undone or unruly", as she has put it. In writing that "it bothers me to see [these] conditions" she is not in the second paragraph of that letter setting out circumstances "but for" which that resignation would not have been submitted, and I find no evasiveness in her testimony in that regard.

Counsel put forward as another "aspect of evasiveness" that when asked "why didn't she raise Herb's actions at staff meetings, [her] answer [was], it was no one else's business ... and that just doesn't ring true". (V. 5, p. 63.) Although I failed to find where in her testimony Ms. Shaw made such a statement, such a feeling on her part would seem to be quite normal. In fact, it really was none of the business of her fellow employees, and unless she had some reason to believe that peer pressure and embarrassment would succeed where appeals to both Mr. Robertson and Mr. Levac had failed, there would be no apparent incentive to embarrass herself by raising a highly personal problem in that forum. Counsel for Mr. Levac referred to this matter as well, noting that "If the situation were as she describes it, I can understand why it may not have been something she'd want to raise in what was a family meeting, but also a public meeting. So I don't fault her for that. I simply note in passing it was an opportunity of which she did not take advantage". (V. 5, p. 126.)

It was submitted that the complainant's failure to inform her family physician of the harassment until March of 1987 was not consistent with her having been harassed over a period of fourteen years with the degree of severity alleged. Ms. Shaw's evidence was that the harassment was particularly bad towards the end of her employment and that the intensity of her migraine headaches at that time caused her to seek medical attention, resulting in her being referred to a specialist. It was in that context that she informed her family doctor of the harassment she was enduring.

It may be that the relationship some patients have with their family physicians is so close and frequent as to make disclosures of this kind routine. Others might be reluctant to discuss personal problems with their physician unless and until disclosure seems inescapably relevant. As to the suggestion that her family physician would have made "an excellent confidant" and the failure to "confide" in her earlier "doesn't make sense", one might note that Ms. Shaw had her family to confide in if she were merely

looking for shoulders to cry on, and until her condition caused her to be questioned by her physician in that regard she may have seen no reason to volunteer such information. That others might have done so in no way affects her credibility. In any case, whereas there is no evidence as to the duration and character of her relationship with her doctor, there is some suggestion that Ms. Shaw did not consult Dr. Ryan about her headaches until 1987 when "they just got, you know, very uncomfortable and very hard, so I sought medical attention on these migraines". (V. 1, p. 138.)

In her report of May 25th, 1990, addressed to counsel for the Commission, Dr. Ryan wrote that the complainant "told me that she was having problems with her immediate supervisor who made life difficult for her by a rather subtle form of harassment". (Exhibit 18.) It was contended that this is inconsistent with Ms. Shaw's evidence both as to the nature of the harassment and as to her assertion that Mr. Robertson was not her "boss". However, the report is not that of Ms. Shaw, nor was its text subject to her scrutiny or approval. Presumably the complainant referred to the person harassing her at the office as the "office manager", in which case it would be readily understandable that Dr. Ryan might inaccurately assume that he was this office worker's immediate supervisor. The appropriateness of the expression "subtle form of harassment" used by Dr. Ryan seems to be a question of semantics. I cannot accept that once the topic was broached Ms. Shaw's disclosure would have been restricted to the enigmatic observation, "I have been subjected to a subtle form of harassment". She would surely have mentioned specific incidents many of which, being indirect and apparently contrived for ease of denial, are rather readily referred to as "subtle" - a term that is in fact a synonym of "indirect". No purpose could have been served by inventing for her doctor a different set of harassments from those alleged at this hearing. The suggestion that Ms. Shaw "told Dr. Ryan something different than she's told us" is simply untenable.

Counsel for Mr. Robertson drew attention to certain apparent

contradictions between Ms. Shaw's evidence and that of Roger Levac, Ev Millward, Reg Taylor and Werner Jansen, because of which he submitted that it could not be found on a balance of probabilities that "the allegations that she makes have been proven". I will deal with these in turn, beginning with the discrepancy between the complainant's assertion, and Mr. Levac's denial, that she had told him about the "swishing" sounds made by Mr. Robertson when she walked about the office wearing nylons. As the validity of this particular submission depends in large measure on the relative credibility of the witnesses, it will be necessary to advert to other aspects of the evidence as well in order to substantiate my conclusions in that regard.

In her April 1985 letter responding to Mr. Levac's request to the staff for their written comments Ms. Shaw stated in reference to Mr. Robertson that "you have been aware of this problem for 11 to 12 years". In her letter of resignation she reminded him that she "had brought this matter to [his] attention many times over the years". Those letters were written before legal action of any kind against these respondents was contemplated, and some corroboration can be found in the fact that other witnesses testified that Ms. Shaw had mentioned to them that she had gone to see Mr. Levac about the situation. She would have no reason to have lied to them. When questioned about this, she testified that she complained to Mr. Levac about "three or four times a year on average, [telling him] "Herb's on my back again" - - I may even have used the term as harassment - - and it's bothering me, upsetting me." She remembered on one of these occasions having told him about the "swishing" sounds made when she walked about the office wearing nylons. When asked whether, apart from that, she had been more specific in recounting her complaints to Mr. Levac than simply telling him that Mr. Robertson had been bothering her, she replied "I don't know if I was or not, I probably was on occasions". (V. 2, p. 6.) Ms. Shaw said that she was visibly upset on these occasions and "would leave crying if I didn't go in

crying", but although "he would listen to, you know, everything I had to say, [he] really gave no satisfaction that, you know, something would be done". However, she said that the harassment did abate for a short time following her meetings with Mr. Levac. (V. 1, p. 85.) She went on to mention that there had been one meeting of the three of them within the first few years of her employment at which Mr. Levac "told Herb and I that we were to get along and work together or he would dismiss both of us". She did not "feel [she] was doing anything wrong", and the threat with which his admonishment was administered to them both, apparently without any attempt to find where the fault lay, was hardly conducive to the lodging of future complaints. (V. 1, pp. 114-116.)

Mr. Levac recalled one occasion "maybe five years after they were employed by me" when there was a "loud argument in the office between Carol and Herb" and he threatened them both with dismissal "if that should happen again". He was asked by his counsel whether "apart from that one occasion were you aware of continuing difficulties between them over the years after that?" He replied, "No. ... I realized they didn't like each other. I took it as personality differences and the work was done to satisfaction and that's all it was." He denied the accuracy of Ms. Shaw's statement in her letter of resignation that she had brought the harassment to his attention many times over the years and he had chosen to ignore the problem. Firstly, he said, there was no real problem and, secondly, he would not have ignored it had there been one that had been properly brought to his attention. He was asked whether he "recalled Ms. Shaw coming to your office and demonstrating for you the sound her nylons made when she walked?". His reply was, "Definitely not", the first time he ever heard that allegation being at the hearing. (See v. 4, pp. 230-237.)

During the course of cross-examination Mr. Levac was driven to qualify his earlier evidence. He did not deny that Ms. Shaw ever came to speak to him, but he said that this was never about

Mr. Robertson's harassing her. However, when pressed he conceded that it was possible, after all, that she had come to speak to him "about Herb bothering her", and it was possible that she had used words other than "harass" to describe the situation. Although he admitted that he was not familiar with the Ontario Human Rights Code and that the term "harassment" held no particular significance for him at the time, he went on to assert that he "would have been very concerned about it if I would have been advised of harassment, especially by gender or sex harassment as we have in the first complaint". (See v. 4, p. 252-253.)

There is the evidence of Mr. Robertson following his admission that he had "needled" the complainant "on and off" for fourteen years. He was then questioned about a questionnaire given him by the Commission in which he stated that "Mr. Levac made me aware of Mrs. Shaw's feelings and as a result I did not subject her to any further teasings or jokes." When asked whether in fact he had stopped he replied "Oh, I can't say I stopped, but I would say not as much as I normally did", and he admitted that the concluding words of his written statement were not accurate. (V. 4, p. 184.)

Levac Supply was a small plant, and Roger Levac made all the decisions in it regarding personnel, and he knew what was going on. Whether they would have called it that or not, it was common knowledge that Mr. Robertson was harassing Ms. Shaw, and there can be no serious doubt that he shared that knowledge. Indeed, he admitted that one of the reasons why these two employees were separated when she returned to work after breaking her ankle in 1986 was to relieve the tension between them.

Plainly Ms. Shaw spoke to Mr. Levac on numerous occasions to complain about Mr. Robertson's bothering her in a way that in fact clearly is harassment. Yet he insists that no problem was properly drawn to his attention. If only she had thought to call his behaviour "harassment", and particularly if she had referred to it as "gender or sex harassment", then (albeit these unfamiliar terms

would have conveyed no additional information to him) he would have been very concerned.

I find Mr. Levac's evidence less than candid in this and in other respects to which I will come, and I have no hesitation in preferring that of the complainant wherever there is any conflict between them. As to the specific discrepancy referred to in argument, the failure of one witness to recall what another has described is not contradictory per se. In any case, Ms. Shaw's clear recollection of an incident that she would have strong reason to remember is to be preferred to the denial of one who, having perceived no real problem (if he is to be believed), would have had little cause to remember what was said.

Still in relation to the matter of credibility, the incident concerning Ms. Shaw's meeting with Mr. Levac in March of 1987 must be reviewed. In the course of her testimony regarding harassment following her return to the office after breaking her leg, the complainant said that she was so unhappy and upset that she consulted her physician who determined "that my nerves were very bad and recommended that I take a week off work to be under her care and she gave me a letter to give to my employer stating such". (V. 1, p. 110.) This was in March, and she arranged to meet with Mr. Levac at the office. That meeting was on a Saturday. Mr. Levac's son Randy was present. The topics of discussion were her desire to have her old job back and the harassment of Mr. Robertson. She said she told him the situation was such as to have caused her to seek medical attention and that her doctor had given her a letter recommending that she take a week off work. She could not recall whether she showed him that letter. In answers given to his counsel Mr. Levac acknowledged meeting Ms. Shaw on a Saturday in March of 1987 while at the office with his son Randy, but he was only asked about the discussion relating to her wanting her old job back. (V. 4, p. 231.) Although counsel for Mr. Robertson asked whether at that meeting he was shown the doctor's letter (to which he replied, "No"), Mr. Levac was not asked whether

Mr. Robertson's conduct had been discussed. However, that aspect of the meeting was pursued by counsel for the Commission to whom Mr. Levac repeated that Ms. Shaw had not shown him the letter at that meeting. But when asked whether she had told him about seeing a doctor, he said that "It's possible that she might have mentioned she'd gone to see a doctor, but the reason why or what, that was not mentioned, definitely not". (V. 4, pp. 253-254). Ms. Shaw had in fact seen her doctor and obtained the letter in question, which was entered as Exhibit 20. She then arranged a meeting on a Saturday to discuss work-related matters that had made her sufficiently distraught to see a doctor. I do not find credible the suggestion that during the course of that meeting, apparently a propos nothing, she would mention having seen her doctor without saying why or mentioning the recommended leave. I am convinced that there must have been some discussion of the doctor's letter as Ms. Shaw testified. And that discussion obviously would have adverted to the conduct of Mr. Robertson.

It was also submitted that the complainant's testimony was contradicted by that of Ev Millward. Ms. Shaw had said that she had seen Ms. Millward reduced to tears by Mr. Robertson on a number of occasions, yet during the course of her evidence Ms. Millward did not so testify. When his counsel said that he understood that "Mr. Robertson was a bit of a teaser or a needler", she said with a smile, "That's right". Her next answer confirmed that she had been one of his targets; but, as it happened, no one asked her how she had reacted. In argument counsel recalled "distinctly her eyes lighting up, she bubbled when I asked her to describe his joking and teasing." (V. 5, p. 72.) My impression was quite different. He thought her smile was one of delight; I thought it somewhat rueful. In fact, the only teasing she discussed was in relation to the complainant, and she did not find that behaviour amusing. I cannot conclude on that basis that Ms. Millward could never have shed any tears over her treatment by the respondent and that, therefore, Ms. Shaw's testimony is not to be believed. Not having

asked Ms. Millward whether she was teased at all, counsel for the Commission did not ask about her reactions to it; but I do not find in that circumstance a valid reason to infer that the questions were not asked in order to avoid the anticipated answers. It was at least as much in the respondent's interest to attempt to rebut the complainant's evidence on this point as it was in the interest of the Commission to seek confirmation of it, and I believe that nothing more than oversight can be read into their mutual failure to enquire. In any case, I am unwilling to regard the absence of testimony in respect of a matter that counsel for the respondent might well have pursued as standing in contradiction to the testimony of the complainant.

It was asserted that, whereas the complainant's testimony "was that Mr. Robertson never mimicked or made innuendo towards men", the evidence of everyone else was that he did. (V. 5, p. 73.) In fact, that was not Ms. Shaw's evidence. She stated clearly and unhesitatingly that the respondent teased, joked with and poked fun at the other men; but she insisted that his banter with them was not comparable with his conduct towards her, a point for which there was general corroboration. (V. 1, pp. 161-164.) Although she had no recollection of his mimicking Mr. Van Order's laugh, her failure to recall the event would not establish any inconsistency in her evidence. Moreover, it was never established that such laughter ever occurred, counsel not having put the question either to his client or to Mr. Van Order.

It was contended that the complainant's evidence in another respect is "contradicted" by the absence of supporting evidence by another witness called by the Commission. Counsel said that Ms. Shaw had testified that she had been told by Reg Taylor of things said behind her back by Mr. Robertson, and Mr. Taylor's failure to confirm having done so contradicts her evidence. In fact, Ms. Shaw said she could not remember who had told her about this practice, and it was only after counsel for the respondent pressed repeatedly that she said she "thought" it might have been Mr. Taylor. Of

course, the material point of this bit of testimony was not who had told her, but the fact that she had been told by someone, and that material point was corroborated by Rod Irwin.

Mr. Werner Jansen is the owner of a company doing business with Levac Supply. He described himself as a friend and hunting companion of Mr. Levac with whom he said he socialized in other ways as well, although Mr. Levac, it may be noted, did not consider him to be "a particularly close friend". Mr. Jansen testified that in the "spring" of 1987 he had a conversation with Ms. Shaw during the course of which he brought up the subject of her "pending" retirement. He could not remember where he had learned that she was leaving Levac Supply, but he was given the impression that it would be "within a couple of weeks time". He thought that he might have heard about it "over the counter" at Levac Supply, intimating that her intention must have been common knowledge if communicated to outsiders in so casual a manner. In any case, he said he asked her "Well, Carol, are you retiring?" she said, "Yes. It's time to hang up the head and go and look after the house and family". (See v. 5, p. 4.) Mr. Jansen confirmed counsel's suggestion to him that Ms. Shaw had spoken in a positive sense (i.e., with an element of enthusiasm) as opposed to having used a tone that implied "I can't stand it here any longer". That evidence stands in apparent contradiction of the following exchange between counsel for Mr. Robertson and Ms. Shaw:

Q. Did you ever have any conversations with [Mr. Jansen] from time to time?

A. I believe so, yes.

Q. Did you ever tell him that you intended to retire shortly to spend more time with your family?

A. I can't recall saying something like that.

Q. Is it possible you said that to him?

A. No.

Q. So if he says you did he's lying, is that correct?

A. Well, basically yes, because I had no intention of retiring. (V. 2, p. 25.)

It would appear that Mr. Jansen used his own words and expressions to convey the gist of a conversation he had had some three years previously, the expression to "hang up one's head" not being one Ms. Shaw would likely use in reference to retirement. But even if Mr. Jansen's evidence were to be taken as a precise verbatim report of his conversation with her so as to require one to conclude that her denial was wrong, in my view that would carry little weight as to the issue of harassment. Ms. Shaw does not recall the conversation at all, but states that she could not have told him she was retiring because in the spring of 1987 she had not yet decided to quit. If she told him otherwise at that time, that would raise a question as to her credibility. But that circumstance is not directly related to the issue of harassment (in respect of which her evidence was corroborated in virtually every material particular), and the evidence raises even more serious questions regarding the credibility of the respondents.

Of course, the real importance of Mr. Jansen's evidence is that, even if an infringement of the Code were made out, it might be taken to indicate that for family reasons the complainant had planned early retirement some time before her letter of resignation was written. That would certainly seem inconsistent with her assertion that but for the harassment she would not have resigned, upon which assertion would appear to depend her claim to special damages in the amount of \$43,273. Consequently, that evidence must be considered most carefully.

I do not find in the relationship between him and Mr. Levac any basis upon which to believe that Mr. Jansen was untruthful. However, there is such striking and vital inconsistency between his statement and that of Mr. Levac, and his testimony is so contrary to the thrust of the entire evidence, that I can only conclude for

the reasons that follow that his evidence is either seriously mistaken or quite significantly incomplete.

To begin with, as counsel for the Commission pointed out, since her husband worked and her children were at the time 19, 21 and 23 years of age, Ms. Shaw would not be likely to plan early retirement in order to spend more time with them. And if that was the reason for her "retirement", why did she apply for unemployment insurance benefits immediately thereafter and then search for and ultimately find her present job?

Of even greater importance in my view is a fundamental piece of evidence not referred to in argument. When asked by his counsel whether he was "surprised when [he] got this resignation letter" Mr. Levac replied as follows:

Yes, I was, although you kind of have a feeling -- well, I didn't think that Carol was going to quit. I know she was displeased for the last six or eight months about her job and a lot of it I probably maybe blame it on to, you know, incapacity because of her accident and so on, and I just, you know, took it and I said "well, maybe she'll come around and we'll be back to the same Carol that she was at one time and do the work properly." so I figured, well, I'll give her time and maybe that will come about. (V. 4, p. 237.)

That answer was given in the context of disclaiming any awareness of harassment which, in his previous answer, he said he would "definitely" have done something about had it been drawn to his attention. The assertion of surprise in that context seems calculated to confirm the absence of knowledge of any reason for her apparently precipitous resignation, such as the harassment inflicted upon her by a fellow employee. It does not, of course, establish the point, since one might well be surprised by the sudden resignation of a person whom one had known to have endured such behaviour for so long. However, Mr. Levac's assertion casts grave doubt on the accuracy of this witness's observations.

Mr. Jansen could not recall how he learned of Ms. Shaw's planned retirement. It might have been "over the counter" at Levac

Supply; and, by implication, it might not have been. If it was, I find it difficult to believe that Roger Levac, the man in charge of all personnel matters in this rather small shop, knew nothing of it. This testimony, if perfectly accurate and left unexplained, constitutes perhaps the most telling piece of evidence in support of the respondents' positions. Was it not possible to find witnesses other than this self-described "bare acquaintance" of Ms. Shaw to testify as to what must have been common knowledge? Why were the other witnesses not asked about it by counsel for the respondents? If Mr. Jansen did not obtain this information "over the counter" at Levac Supply, who told him about the "retirement"? Was it perhaps his friend, Roger Levac?

Although Mr. Levac expressed surprise at receiving Ms. Shaw's letter of resignation, it was not in fact a totally spontaneous act. Her evidence was that Mr. Robertson's conduct had not driven her to quit earlier "for financial reasons. Roger pays very well and I have family to help support, and then it was the deferred profit sharing plan that if you leave there's the five-year penalty". (V. 1, p. 117.) Despite such incentives to stay on, she says that the harassments were edging her ever closer to quitting. As stated in the complaint itself:

17. During the period between March and June I was fighting resigning as the harassment from Mr. Robertson had increased by way of his innuendoes and sarcasm.

18. On June 24, 1987, I had reached the end of my rope. I went to tell Mr. Roger Levac I was quitting at 4:00 p.m. but he was just going out the door so I left a letter of resignation.

Had the complainant made up her mind in the spring that she was going to retire in order to spend more time with her family, communicating that decision in a "positive" way even to relative strangers, her letter of resignation of June 24th would be totally inexplicable unless attributed to a machiavellian plot quite beyond her capacities and, in my view, foreign to her character. There is no suggestion in evidence or in argument that between the time

of her conversation with Mr. Jansen and her resignation she became aware of the Ontario Human Rights Code and decided to fabricate evidence (beginning with the letter of June 24th) to support a complaint that might relieve her of the penalty attaching to premature retirement under the profit-sharing plan. Her first meeting with the Commission was on June 29th, 1987, a fact readily accepted by counsel for the respondents who suggested that it was unnecessary that the memorandum to that effect be entered as an exhibit; and it was her unchallenged testimony that she knew nothing about the Human Rights Code until then. Her letter of resignation was a genuine statement of her feelings and belief at the time, and that letter is absolutely irreconcilable with any suggestion that for reasons unrelated to Levac Supply, and with some degree of enthusiasm, she had already decided to retire.

Before leaving this matter another possible explanation as to why Ms. Shaw might have had a "positive" attitude in the spring of 1987 regarding the retirement that would permit her to spend more time with her family must be considered. Counsel for Mr. Levac asserts that she did not know of the "penalty" in the profit sharing plan affecting resignations of persons under fifty-five years of age. Under cross-examination she claimed that she knew about that provision, but that at the time she resigned she hoped that there was some possibility that she might get the full amount. However, Mr. Levac testified that he had to consult his accountant as to the exact amount to which Ms. Shaw was entitled and that when he got this information about two weeks later he informed her by telephone. He said that she seemed surprised, and that when they met later to discuss the matter further he formed the impression that she had been expecting the "full" amount.

Obviously Ms. Shaw would not have known the exact amount she was to receive. Even Mr. Levac, one of the trustees of the plan, had to consult his accountant. While Ms. Shaw might well have expressed surprise, and even dismay, upon learning of her exact entitlement, perhaps having anticipated considerably more, and

while she might have hoped to get the full amount, it does not follow that she was totally ignorant of the "penalty" provision and that therefore, contrary to her evidence, she must have decided to resign not because of Mr. Robertson's conduct, but in order to collect that money. She did not hear from Mr. Levac as to her exact entitlement under the plan until after she had consulted the Commission at the suggestion of the Unemployment Insurance Office. Had she expected the "full" amount, then obviously compensation for the "shortfall" could not have been a reason for starting these proceedings, which does not mean that she is disentitled to a claim in respect of it. The profit sharing plan represented her "pension" in a broad sense, and I cannot believe that she would not have known all along that early retirement would reduce her entitlement quite substantially. As already indicated, I prefer her evidence to that of Mr. Levac where there is any inconsistency between them. In any case, I accept her evidence on this point. Ms. Shaw testified as to what she knew; Mr. Levac testified as to his impression of what she had expected.

I am driven by all of this to conclude either that Mr. Jansen was seriously mistaken, or that the conversation he described took place in a context consistent with the rest of the evidence, which context did not happen to emerge at the hearing. For instance, it seems not unlikely that in the spring of 1987 Ms. Shaw would have told some of her fellow employees (all of whom were aware of her unhappiness) that she was "fighting resignation". Mr. Jansen might have heard that she was "thinking of quitting" while transacting business at the front counter and then, in ignorance of the full circumstances, he might have raised it with her in passing simply to make conversation. It would not have been out of character for Ms. Shaw in talking to a relative stranger who broached that subject to assign to her averred "retirement" some innocuous reason (such as "spending more time with her family"), rather than to air her problems before him. Had that been what occurred, her denial in 1990 would be quite understandable. While she had been

wrestling with the idea (and she made no attempt to hide the fact), she had not reached a decision in the spring of 1987 to leave Levac Supply at all, let alone in order to spend more time with her family. This, coupled with her failure to recall the conversation, much less a context which might have led her to put her questioner off by making the imputed statement, would explain her denial. Clearly, the fact that she was struggling with the decision whether to resign as early as March of 1987 - as is forthrightly stated in her complaint - cannot be held to impugn her evidence. Surely if it is an infringement of her right to harass her into quitting in June, it would be no less an infringement of that right to harass her into quitting earlier.

I have advanced this hypothesis only in order to indicate why I am not prepared to conclude that Mr. Jansen was untruthful. However, I cannot accept his evidence as establishing that the complainant had decided in the spring of 1987 to retire for purely personal reasons.

The final inconsistency with which the complainant's evidence is allegedly affected can best be expressed in the form of two questions: If the respondent's conduct was as agonizing as the complainant suggested, why would she want to return to the office sooner than necessary after breaking her ankle in September of 1986? And, once back, but assigned to different duties in a new location, why would she have badgered Mr. Levac to be returned to her "old job" which would re-unite her with her alleged tormentor?

Although counsel for Mr. Robertson did not question Ms. Shaw regarding these matters, counsel for the other respondents did. Mr. Levac was later to testify that some two weeks after Ms. Shaw broke her ankle, and despite her take home pay being unaffected by a more prolonged absence, she called him about returning to work, telling him that she was "going nuts" at home. Her testimony was that she had been uneasy about the state of the accounts receivable, having already been away on holidays immediately before

her injury. She agreed that it was possible that she had suggested to Mr. Levac that she was "going nuts" at home, "but the only thing I would be going nuts about was worrying about the business". Although she said that Mr. Levac did not share that concern, "he isn't in the general office for long periods of time and it was my opinion of doing the job for 14 years that I felt I was needed there". (V. 1, p. 209.)

While she might have seized the occasion of her broken ankle to secure a brief but fully paid respite from Mr. Robertson's unwelcome attention, there is no basis for assuming that Ms. Shaw was not truthful as to why she returned to work earlier than was medically necessary. Not having quit, her return to work was relatively imminent anyway. The longer it was delayed the sorrier would become the state of the accounts receivable which she anticipated having to cope with. Her testimony, corroborated in that regard by the evidence of the respondents, was that she enjoyed her specific tasks, was convinced that she did them well and found fault with the way they were carried out by her replacement. She exhibited a distinctly proprietary air towards the accounts receivable and might have been anxious to rescue them from the hands of another lest they be lost to her forever - a fear which, whether then harboured or not, she soon enough discovered to her chagrin was not baseless. She never did get her previous work back.

The complainant's unhappiness with the changes in her workload upon her return has already been reviewed in another connection. She was located temporarily in what had been the salesman's office and put to work learning word processing on the computer, a skill that she was unable to acquire adequately. She pressed from the outset for a return of her former duties, only to be put off alternatively with the explanation that Marg Malloch had not yet sufficiently mastered those tasks to end her on-the-job training, and with the prospect of undertaking a new challenge in a position

yet to be created.

However, the complainant did not languish idly in front of the computer for the remaining nine months of her employment. She soon found herself doing the work formerly assigned to Ms. Malloch by Mr. Robertson. He was now assigning that work to Ms. Shaw on a daily basis. While the physical separation afforded some relief, contact with him was inescapable because he brought her work and came frequently to the salesmen's office to access files stored there. (See V. 1, pp. 103-105.)

Renovations were under way that fall, and Ms. Shaw was aware that they entailed removal of the wall separating the salesmen's office from the general office of which it was destined to become a part. An entirely new office space was also being constructed between the general office and the outer office where the counter was located. As the following statement shows, Ms. Shaw knew that, unless the totally new position materialized, upon completion of these renovations she would be returned to the enlarged general office regardless of the work assigned to her:

I didn't like being in the same office as Herb again, but I knew this before the wall came down that I was going to be in the same office and the other office, the new office wasn't quite completed and I approached Roger and asked Roger when the wall came down if it would be possible for me to have a work station in the new office rather than be in the general office because not being in the same office as Herb, as I stated before, the harassments weren't as frequent and I thought maybe being in the other office would help. (V. 1, p. 105.)

It should be stressed that her attempts to regain the work she had been doing for fourteen years were described by the complainant in response to the questioning of counsel for the Commission, not grudgingly admitted under cross-examination. She clearly disliked her new assignments. While circumstances provided the partial and temporary relief of a dividing wall, she knew it was not to last; nor did it. By December of 1986, six months before she resigned, she was returned to the general office, but not to her former

duties. Her position was then worse than ever. And so, too, she testified, was the harassment.

It is to be remembered that Ms. Shaw had not yet decided to leave Levac Supply, with its above average salaries, additional bonuses and profit sharing plan. Her stated intention was to remain there until her normal retirement occurred. Is it really strange that she should have regard to the long term, that she should fight in the fall of 1986 to get back the work she preferred doing? Is it anomalous that she would sacrifice the partial and temporary relief from Mr. Robertson's harassment afforded while renovations were under way in order to secure that other important goal? I am fully persuaded that it is not.

Towards the end of his argument counsel for Mr. Robertson referred to the character evidence led on his behalf. Although their relationship got off to a shaky start, he won the good opinion of Father Byrne who testified as to his contribution to pre-marriage courses sponsored by the Church. His name had been given as a reference in the job applications of Julie Slack, the young lady who grew up next door and said how likable he was. Susan Saunders, who also liked and admired him, found him to be a religious person. "That's not the type of person who is going to be Dr. Jekyll and Mr. Hyde", his counsel observed. Unfortunately, there are Jekyll and Hyde personalities and, to the extent that the allusion is at all apt, the evidence leads me to ask, not whether, but why he is one of them - at least in respect of the harassment of the complainant.

Having examined the evidence in the light of all of counsel's various submissions as thoroughly as I was able to do, I am led to the conclusion that Herb Robertson's behaviour towards Carol Shaw during the course of their common employment at Levac Supply over a period of nearly fourteen years was to his actual knowledge most distressing to her. It is quite clear that he engaged in a course of vexatious comment and conduct in the workplace that he knew or

ought reasonably to have known to be unwelcome to the complainant. However, whether or not Mr. Robertson's intentional infliction of mental distress might be actionable in some other forum, it can attract no liability as an infringement of sections 6.-(2) and 8 of the Code unless it "was because of sex", and it is to that aspect of the matter that I now turn.

II. WAS THE CONDUCT "BECAUSE OF HER SEX"?

Why Mr. Robertson behaved towards Ms. Shaw in the way he did must be inferred from the entire evidence including, of course, his own testimony. As that evidence unfolded, four possible bases for his behaviour surfaced, each of which requires examination before being accepted or rejected as a reason for his harassment of the complainant: (1) jealousy over her increasing responsibilities; (2) personal dislike of Ms. Shaw; (3) the fulfilment of his managerial responsibilities; (4) the fact that the complainant was a woman.

A. Was it "Professional" Jealousy?

Early in her testimony, when describing the work assigned to her, Ms. Shaw mentioned that some time after she started at Levac Supply she was given certain work that Mr. Robertson used to do, namely, "the job of doing the salesmen's breakdown journal for their commissions and also given the cash sales and cash to balance at the end of each day and to lock the money and the ledger in the safe before leaving at night" (v. 1, p. 43). When questioned later about Mr. Robertson's changing attitude and behaviour towards her, Ms. Shaw had the following exchange with counsel for the Commission:

Q. At the time did you have any explanation that you developed in your own mind with respect to why this might have been happening?

A. The only thing I could come up with or thought of that it might be was jealousy, the fact that I was getting more and more responsibility. That's the only conclusion I could draw. (V. 1, pp. 61-62. Emphasis added.)

The reference was to the beginnings of the harassing course of conduct. "At that time" it had not yet occurred to Ms. Shaw that perhaps she was being victimized because (or in part because) she was a woman, and she was not questioned as to exactly when she came to suspect that that was the case. Of course, even had it not occurred to her until some time after she left Levac Supply, her ignorance in that regard would not exculpate Mr. Robertson if in fact that was the cause of the harassment. An infringement of subsection 6(2) of the Code does not require the injured party to know at the time of its occurrence that the harassment is because of sex.

Mr. Robertson, who listened to her testimony in that regard, denied that he was jealous or resentful of the complainant, and he said that he discerned no increase in her responsibilities in terms of their importance. He said that "She may have had a change in job descriptions, but as far as responsibility goes I wasn't aware of that". (V. 4, p. 148.) He readily acknowledged that Ms. Shaw was correct concerning the tasks she had said were transferred from him to her, but when asked whether "it would be fair to say that she had some increased responsibilities", he replied, "Oh, I don't know whether it would be more responsibilities, but more jobs, yes". (V. 4, p. 164.)

The complainant did not claim that Mr. Robertson's motivation was in fact jealousy. She said she did not know why he began to act towards her as he did but, for want of a better rationalization, that is what she had attributed it to at the time. Mr. Levac said that they had been "equals" during their time together at Levac Supply, and Mr. Robertson perceived no increase in her relative importance to the company. In these circumstances I cannot find that the cause of Mr. Robertson's harassment was work-related jealousy of the complainant.

B. Was it Personal Animosity?

Several of the witnesses testified that Ms. Shaw and Mr.

Robertson did not like each other. Certainly that was the general perception, and understandably so. Indeed, in a letter written to Roger Levac, the complainant herself wrote that "There is still no love loss between Herb and I" (sic., Exhibit 7). While it is quite obvious why she might have come to dislike him, the crucial questions in this regard are, Did he dislike her? and, if so, Why? No reasonable basis for his disliking her ever surfaced. When his counsel raised the incident with her, Ms. Shaw recalled that very early in her employment Mr. Robertson called her husband a quitter for having left the company baseball team. However, that matter was not referred to again, nor even raised as an explanation of his conduct towards her. In fact, Mr. Robertson categorically denied having any personal dislike of her. He was asked, "Would it be fair to say that you didn't particularly like Carol Shaw?" He replied, "No. I didn't like Carol's work habits". (V. 4, p. 189.) This leads into the next possible reason for his conduct. But, before turning to that reason, it is to be noted that should I accept his evidence on this point I must reject dislike of Ms. Shaw (the person) as the (or even one of the) reasons for his behaviour; on the other hand should I find it improbable that he could have treated her as he did without having formed an active dislike of her, I am left to wonder why he disliked her. Could it have been because this person was a woman?

C. Was it the Pursuit of Managerial Responsibilities?

It was Mr. Robertson's evidence that he found the complainant at times slow and careless and, conceiving it to be his function to see that her work was done in a timely way, he did indeed resort to "needling" her in an attempt to get "a little more effort" out of her. "I bugged and teased to get more productivity". (V. 4, pp. 146, 149, 153.)

To begin with, even if some of his barbs might lend themselves to such a purpose (and "Slow Down, You Move Too Fast" is the only one of them that would seem at all apt), the bulk of them could not

conceivably have been uttered in order to secure an improvement in her performance. No credence can be attached to the suggestion that such expressions as "waddle, waddle, waddle", "swish, swish, swish", and "horse, horse" related to certain shortcomings in the complainant's work which it was hoped she might overcome by having them drawn to her attention in such fashion.

As to the quality of Ms. Shaw's work, it is to be noted that all the other employees who gave evidence, including those called by the respondents, found Ms. Shaw helpful and efficient, and they believed that she was doing a very good job. After she left Levac Supply she obtained an excellent letter of recommendation from Roger Levac. His nephew Gaetan Levac, who described himself as the office "co-ordinator", and who appeared to have attained a position of some influence in the company, said that he would entirely agree with that letter. (V. 4, p. 47.) Although Roger Levac testified that his letter somewhat overstated Ms. Shaw's abilities, he concluded that "generally I have to say that the job was done efficiently, at times cheerfully" and that none of his employees was perfect, nor "was the boss perfect either". (V. 4, at 238-9).

It is beyond question that Mr. Robertson had no authority to adopt measures to improve the performance of fellow employees, let alone to embark upon what would be in any case an unacceptable tactic, namely, "needling" and otherwise goading them into living up to his expectations. Yet, having regard to evidence already reviewed, he had some justification for believing that he had some responsibility for work flow in the office. That being so, it is understandable that he might be concerned with the efficiency of others. However, if he really harboured such concerns about Ms. Shaw he ought to have restricted his reactions to imparting his observations to Roger Levac, the only person entitled to take appropriate action in that regard. (It may be noted that he testified that on a few occasions over the years he told Mr. Levac that he did not find Ms. Shaw's work performance satisfactory. The latter confirmed this, but said that "that might have happened

maybe once a year, twice a year, but I never took it as a complaint". See v. 4, pp. 193 and 263.)

That Mr. Robertson intimated to Ms. Shaw and to others that she was inept is not proof of his belief in that regard, reasonably held or not; indeed, it was a part of the harassment. Not only was his alleged opinion of Ms. Shaw's competence in large measure gratuitous, but it is sufficiently contrary to the evidence as to cast doubt upon his claim to have formed it and, hence, upon his assertion that it was the basis for his callous behaviour. Indeed, when asked whether he would agree with Mr. Levac's very positive letter of recommendation written on behalf of Ms. Shaw he replied, "To a degree". (V. 4, p. 286.)

He said that his "managerial technique" as applied to Ms. Shaw was unsuccessful virtually from the outset, and I find it inconceivable that he persisted in employing it for over a decade after it had obviously failed and despite his knowledge of the distress it was causing. Even had that been his initial purpose (which I do not believe), it surely cannot be the reason for his persisting in such conduct, and I reject any suggestion that his behaviour was adopted and pursued as a corrective measure intended (one is expected to presume) to secure the interests of the company.

D. Was it "Because of Sex"?

Much of the evidence regarding this issue has been reviewed in other connections and the rest of it will be introduced within the context of the legal framework within which the question must be considered. However, only after the evidence of all the other witnesses has been dealt with will I turn to the expert evidence of Mr. Astrachan which was adduced in relation to this issue.

(1) The Evidence Other Than That of Mr. Astrachan.

Because the respondent's conduct towards the complainant may not readily appear to have been of a sexual character, counsel for

the Commission drew a distinction between "sexual harassment" as considered in many other contexts and "harassment because of sex" as required under subsection 6(2) of the Code. She then contended that the word "sex" in that provision means "gender", and that "harassment because of sex" includes both sexual harassment and harassment engaged in simply because of the victim's gender.

(a) Was the conduct sexual harassment?

Although most of the Commission's argument on this issue - and all of the submissions of the respondents - dealt with the narrower question whether Mr. Robertson treated Ms. Shaw as he did because she was a woman, counsel for the Commission began with an argument intended to show that some of Mr. Robertson's verbal conduct might be regarded as being of a "sexual nature" within the meaning of the expression "sexual harassment" as formulated by Chief Justice Dickson in Janzen v. Platy Enterprises Ltd. (1989), 10 C.H.R.R. D/6205, in these terms:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. ... Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. (P. D/6227, para 44451.)

It was suggested that "unwelcome sexual actions" may be verbal and need not be explicitly sexual in order to amount to sexual harassment. Two decisions were referred to as authority for that proposition: Torres v. Royalty Kitchenware Limited and Guercio (1982), 3 C.H.R.R. D/858; Mitchell v. Traveller Inn (1981), 2 C.H.R.R. D/590.

In Torres, one of the allegations of sexual harassment was that the respondent repeatedly told the complainant how beautiful

she was, and counsel submitted that this was found to be verbal sexual harassment.

In Mitchell v. Traveller Inn (1981), 2 C.H.R.R. D/590, it was said that:

There was nothing explicitly sexual about Mr. Czaikowski's remarks making it at least conceivable that this was a case of misunderstanding. On the other hand, harassment does not have to be explicit to be contrary to the Human Rights Code. (P. D/592)

The argument then made on the basis of these cases was to this effect: If calling a person "beautiful" is a sexual reference or action amounting to sexual harassment should it be unwelcome then so, too, would it be sexual harassment to call a person "ugly" where that comment is unwelcome, particularly if it "detrimentally affects the work environment or leads to adverse job-related consequences for the victim". The comments "waddle, waddle" and "swish, swish" as they were made in the circumstances of the present case imply sexual unattractiveness. Their constant repetition over a long course of time demeaned the very sexuality of the complainant. This conduct was harassment, it was sexual, and it was therefore "harassment because of sex".

This argument presents a number of difficulties, not the least of which is the apparent absence of precedent. The three cases upon which it rests may be distinguished from the present situation in that unwelcome sexual contact was either solicited or demanded in each of them, and the validity of the argument depends upon whether that difference, which was not addressed by counsel, is crucial.

In Torres, the respondent had fondled the complainant, and his calling her beautiful was a part of his attempt to persuade her to have sexual contact with him. Her complaint "was to the effect that she had been verbally and physically harassed" (p. D/859, para. 7612.). In finding the respondent's conduct to have been sexual harassment (and discriminatory), the board did not separate

the two elements so as expressly to affirm that the verbal aspect of his conduct would have been sexual harassment even had it stood alone. Nor does the decision propose any test for distinguishing sexual verbal harassment from non-sexual verbal harassment. While I have no doubt that flattering comments, such as that one is "beautiful", might in certain circumstances amount to sexual solicitation and constitute sexual harassment for that reason, I do not think that the decision in Torres can be taken to have gone further than that. Telling a person she is unattractive can hardly be intended as an inducement to sexual contact (except if meant as some subtle form of reverse psychology); and if a sexual advance or solicitation is essential, such comments could not amount to sexual harassment. It would follow that, as nothing that was said or done by Mr. Robinson was intended or taken to be soliciting sexual favours, he did not sexually harass Ms. Shaw.

In Mitchell there was no express solicitation or demand, but the respondent was held to have implied that "sexual compliance was to be a condition of her prospective employment". While that case is some authority for the proposition that the sexual character of verbal harassment need not be explicit, it cannot be taken to stand for the wider proposition that that which is implied need not be sexual activity of some kind.

While the Torres and Mitchell decisions cannot be read as positive authority for the proposition put forward by counsel for the Commission, neither are they inconsistent with her argument; and whether verbal conduct demeaning a person's sexuality is a form of sexual harassment depends upon whether it can be found to come within the "broad definition" of that phrase in the Janzen case.

In Janzen the issue was whether the respondent's unwelcome conduct engaged in for sexual purposes was discrimination in the workplace on the basis of sex (gender). It had been held by the Court of Appeal of Manitoba that it was not gender discrimination, since the complainants had been molested because of their personal

attributes, not all of the waitresses being similarly accosted. The Supreme Court found that the harassment was gender related since even if not all women were at risk of being treated in this fashion, only women were. In formulating his broad definition of sexual harassment, Chief Justice Dickson reviewed the jurisprudence and other literature relating to the question whether sexual harassment in the workplace may be sex discrimination. He then made this observation:

Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands. (P. D/6225, para. 44444.)

That passage, particularly if read out of context, would appear to indicate that sexual harassment must involve an undue attempt to pressure its victim into engaging in sexual activity of some sort. However, that observation was made in the light of cases the facts of which invariably involved such conduct, and the "broad definition" subsequently reached appears to be considerably wider than that isolated comment might suggest. Moreover the reference to "a position of power" reveals the narrow context of the comment. If read literally it would lead to the obviously false conclusion that there can be no sexual harassment between co-workers where the aggressor does not stand in a relationship of power relative to the victim.

Immediately following that observation Chief Justice Dickson set out the following guidelines established by the American Equal Employment Opportunity Commission, which he points out "have been quoted with approval by courts and human rights tribunals in both The United States and Canada":

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment, when (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment, (2) submission to or rejection of such conduct by an individual is used as the

basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (At p. D/6225, para. 44445. Emphasis added.)

The Chief Justice went on to make the following observation:

Emerging from these various legislative proscriptions is the notion that sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. ... Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour. (P. D/6226, para. 44447. Emphasis added.)

What seems to be the common thread running through all of this is that sexual harassment has to do with sexual activity, whether effected, proposed or referred to. Clearly, sexual references or comments that do not amount to sexual advances or solicitations may in some circumstances constitute sexual harassment. For instance, if a man harassed a woman in the workplace by means of explicit daily accounts of his sexual exploits of the previous night, that would be sexual harassment.

The question whether negative and demeaning comments of a sexual nature can amount to sexual harassment does not appear to have come before any Canadian court or human rights tribunal until now. Thus, it is not surprising that the discussion leading up to the definition formulated in the Supreme Court concentrates on sexual activity involving demands or solicitations, since that was the factual context of the cases considered. However, since legal definition depends as much upon deduction from principle and policy as it does upon induction from the facts of past cases, it does not follow that the meaning of sexual harassment cannot extend to circumstances of a kind not yet considered.

In stating that he was not "seeking to provide an exhaustive definition of the term," Chief Justice Dickson clearly indicated that the "broad definition" of sexual harassment that he was about to propound was not restrictive. Central to that definition is the requirement that the behaviour consist of "unwelcome conduct of a sexual nature". As that definition was articulated in the context of the workplace, the Chief Justice went on to describe the employment consequences that must ensue in order for that conduct to constitute sexual harassment in the workplace. In the present case consequences of that kind were caused by the harassment, and the question I am left with is whether that unwelcome conduct was of a "sexual nature". In seeking to answer that question I do not feel constrained by the facts of past cases to conclude that the novel circumstances of the complaint before me cannot amount to sexual harassment simply because they involve neither sexual demands nor solicitations.

The development of human rights jurisprudence regarding sexual harassment has been an inventive exercise undertaken to bring such conduct within the reach of prohibitions against discrimination, especially in order to provide a remedy for such conduct in the workplace. As was said by Professor Cumming in the Torres case (supra, p. D/862, para. 7648): "There is no doubt that boards of inquiry, by their creative interpretations of the human Rights Code, have made a substantial penetration into the workplace in order to eradicate an insidious form of discrimination." In expressing its view as to the meaning of sexual harassment, the Supreme Court in Janzen would appear to have espoused that liberal course. It seems to have provided a larger definition than might otherwise have been attached to that phrase, thereby making it easier to eradicate from the workplace other insidious forms of discrimination and harassment not as readily seen to fall within the legislation as conduct of a kind already dealt with by the courts.

As to the taking of a broad view of the meanings of "sexual

harassment" and "harassment because of sex", it should be stressed that the Code is to be interpreted liberally and in the light of its preamble, which makes it the public policy of Ontario to "recognize the dignity and worth of every person" and to create "a climate of understanding and mutual respect ... so that each person feels a part of the community and able to contribute to [its] development and well-being." Support for this view will be found, *inter alia*, in the Cuff and Janzen cases, *supra*, and in the recent decision in Cashin and Canadian Human Rights Commission v. Canadian Broadcasting Corporation (1990), 12 C.H.R.R. D/222. The Supreme Court of Canada has expressed such views in a number of important decisions: Robichaud v. Canada (Treasury Board) (1987), 8 C.H.R.R. D/4326; Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. (1985), 7 C.H.R.R. D/3102 (S.C.C.), at p. D/3105; Action travail des femmes v. CN, (sub nom. Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)) (1987), 8 C.H.R.R. D/4210.

In O'Malley, *supra*, the Supreme Court said such legislation must be given "an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect". And in Action travail des femmes Chief Justice Dickson said that:

Human rights legislation is intended to give rise, amongst other things, to individual rights of great importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize these rights and to enfeeble their proper impact. (At D/4224, para 33238.)

The words emphasized in the passages quoted earlier from the Janzen case would seem to indicate that the "broad definition" laid down in that case extends to some of the behaviour that occurred

in the case before me. According to the guidelines established by the American Equal Employment Opportunity Commission, verbal conduct of a sexual nature will constitute sexual harassment when such conduct has the effect of creating an offensive working environment. After citing that guideline with approval, Chief Justice Dickson went on to say that sexual harassment may take a variety of forms and that it encompasses inappropriate comments.

In the interests of thoroughness, I should note that when the province of Ontario legislated against sexual harassment so as to make it unnecessary to bring such conduct under the rubric of discrimination, two distinct provisions were inserted in the Code. While subsection 6(2) deals with "harassment in the workplace because of sex", subsection 6(3) deals with conduct occurring in certain circumstances outside the workplace. Although what is referred to in subsection 6(3) is unquestionably unwelcome conduct of a sexual nature, it is not referred to as sexual harassment. Instead, the section provides as follows:

- (3) Every person has the right to be free from,
 - (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
 - (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Unless there is a difference between "harassment because of sex" and "sexual solicitation or advance", one would expect the same wording to be used in both subsections to describe the prohibited conduct. The questions this gives rise to are, What is that difference? and, Does it affect the interpretation of subsection 6(2)?

The conduct involved in subsection 6(2) is in one respect narrower in that subsection 6(3) does not require any "harassment" as defined by section 9.-(1)(f). In other respects it is broader than subsection 6(3). It is not restricted to the conduct of persons in a position to bribe or threaten, but includes everyone where the conduct occurs in the workplace, nor is it limited to sexual advances and solicitations.

It would appear that subsection 6(3) is meant to cover the very specific situation where one person who is in a position of power vis a vis another (whether in a workplace setting or not) takes advantage of that relationship even on one occasion in relation to obtaining sexual favours. The provision does not refer to "sexual advance or solicitation", nor avoid the word "harassment", so as to establish an alternative expression of co-extensive meaning to be used in substitution for the term "sexual harassment". It uses that terminology for two entirely different reasons. In the first place it indicates the danger from which the disadvantaged victim is sought to be protected, namely, compliance with a sexual demand which, of course, can only be generated through some sexual advance or solicitation. In the second place, protection is thereby afforded against single instances of such behaviour.

I do not think it can be successfully contended that the enactment of separate provisions was intended to distinguish sexual harassment from non-sexual gender harassment, the former being renamed "sexual solicitation or advance" and dealt with exclusively in subsection 6(3), while subsection 6(2) applies exclusively to non-sexual gender harassment, to be known as "harassment because of sex". That interpretation would leave outside the ambit of these provisions cases of sexual harassment of one co-worker by another who happens not to be in a position to confer, grant or deny a benefit or advancement. That conclusion is clearly false, and such cases are clearly intended to come within the scope of subsection 6(2) as one of the kinds of "harassment in the workplace

because of sex" that everyone has a right to be free from.

In the final analysis, the differences between subsections 6(2) and 6(3) do not appear to preclude the application to the former of the broad definition of sexual harassment propounded in Janzen in the context of determining the full meaning of "harassment because of sex."

It seems to me incontestable that to express or imply sexual unattractiveness is to make a comment of a sexual nature. Whether the harasser says "you are attractive and I want to have sex with you", or says, "you are unattractive and no one is likely to want to have sex with you," the reference is sexual. It is verbal conduct of a sexual nature, and it is sexual harassment in the workplace if it is repetitive and has the effect of creating an offensive working environment; it is sexual harassment in the form of an inappropriate comment of a sexual nature. If such conduct is unwelcome and detrimentally affects the climate of the workplace and the climate of understanding and mutual respect which the legislation seeks to foster, and if such behaviour is an integral part of a course of conduct that drives its victim away by attacking her dignity and self-respect both as an employee and as a human being, can it be said that it is not sexual harassment merely because the harasser was not making a sexual advance or solicitation? In my opinion such conduct is a form of sexual harassment, and it remains to consider whether Mr. Robertson's behaviour is conduct of that kind.

When a man chants "waddle, waddle" within her hearing every time an overweight woman walks about the office, or mimics the swishing sound made by her nylons rubbing together because of her weight, what purpose can he possibly have except to indicate that she is physically unattractive? Why draw attention to her bodily inelegance in such circumstances other than to indicate that she is sexually undesirable? What other way is the victim to take such comments? The respondent was not a disinterested observer simply

making an objective comment upon someone's unfortunate condition. In my opinion he knew, or ought to have known, that these gibes were (to use the vernacular) a "sexual put-down" that would have the very effect described by Ms. Shaw when recounting one of her meetings with Roger Levac:

One instance I remember clearly was this. "swish, swish, swish" with the nylons. It upset me so bad I walked into Roger's office, I asked Roger to listen and I walked very close to him and I said "Listen to the sound that my nylons are making" and I walked back and he listened, and I told Roger at that time that when I walked in the office and this noise could be heard Herb would mimic it by saying "swish, swish, swish". I said "Do you know how that makes me feel and how degrading it is?" (V. 1, pp. 64-65.)

For these reasons I must conclude that some of Mr. Robertson's harassment was of a sexual nature and that, even though many other aspects of his conduct may not have been, the course of conduct that caused Ms. Shaw mental anguish and drove her from her job was sexual harassment and, therefore, harassment because of sex. In my view one cannot legitimately separate the comments that were of a sexual nature from the rest of the complainant's conduct so as to conclude that only the latter caused the damage complained of, thus escaping liability for the wilful infliction of such harm. However, lest I be found wrong in these conclusions, it is necessary to consider the remaining arguments of the parties regarding this issue.

(b) Was the conduct gender harassment?

I turn now to the alternative submission of the Commission that, even if it were found that Mr. Robertson's conduct did not amount to sexual harassment so as to bring it within the scope of subsection 6(2) of the Code, it was aimed at the complainant because she is a woman, and gender harassment in the workplace is an infringement of that provision. The respondents did not contest that interpretation of the provision, and I have no doubt that it is correct. However, as counsel were unable to refer to any

Canadian case dealing with the question whether "harassment because of sex" includes non-sexual conduct, I feel constrained to state quite briefly why I agree with the Commission's submission that it does.

To begin with, the primary meaning of the word "sex" is the fact or character of being either male or female, "coitus" being a secondary meaning. Unless the context indicates otherwise, that word is to be given its primary meaning. Indeed, that is the meaning given to it in sections 3 and 4.-(1) of the Code, and there is nothing to suggest that it should have a different meaning in this subsection. Moreover, as already pointed out, early decisions in the field of human rights found that sexual harassment was discrimination because of sex (*i.e.*, "gender") in order to subject that conduct to provisions that prohibited discrimination but which did not deal expressly with sexual harassment. It would be odd to find that, now that harassment because of sex is dealt with in a separate provision, the word "sex" does not mean gender and that to harass a person non-sexually solely because of her or his gender does not come within the provision.

There is little direct evidence that the respondent treated the complainant as he did because she was a woman - indeed, none, according to the respondents, and the Commission relied heavily on circumstantial evidence from which it submitted that an inference to that effect should on the balance of probabilities be drawn. The submission that an infringement of a right conferred by the Code may be based upon indirect or circumstantial evidence was supported by reference to the following cases: Whitehead v. Servodyne Canada Ltd. (1986), 8 C.H.R.R. D/3874; Boehm v. National System of Baking Ltd. (1987), 8 C.H.R.R. D/4110; Toth v. Sassy Cuts Inc. (1987), 8 C.H.R.R. D/4376; Hendry v. Liquor Control Board of Ontario (1980), 1 C.H.R.R. D/160; McAra v. Motor Coach Industries Limited (1988), 9 C.H.R.R. D/4858; Hillicke v. Creative Financial Services Corp. (1989), 10 C.H.R.R. D/5895. Although these cases dealt with discrimination, there is no reason to suppose that the

same principle would not apply to harassment, and the following observation made in the Toth case expresses a conventional view that is equally apt in respect of harassment:

Other cases have described racial discrimination as being of an "insidious and concealed nature" and have indicated that often the matter is left to be decided on the basis of inference from what is, in effect, circumstantial evidence. Conduct to be found discriminatory must be consistent with the allegation of discrimination and inconsistent with any other explanation. (P. D/4377, para. 34285)

The evidence from which it was submitted that it should be inferred that the harassment was aimed at the complainant because she was a woman consisted of: (i) the use of the expressions "waddle, waddle" and "swish, swish"; (ii) the views expressed about married women working; (iii) the treatment accorded other women, particularly in the workplace; (iv) the reference to Ms. Shaw as a "fat cow".

(i) The respondent's use of certain expressions

Counsel for the Commission began this aspect of her argument by referring to the "waddle, waddle" and "swish, swish" episodes. These words and sounds were made in imitation of the complainant's walk, and it was contended that they related directly to her sex, since only females wear nylons that make the noise in question. Counsel for Mr. Levac countered this by pointing out that waddling is not a phenomenon peculiar to the female sex, and by suggesting that the imitation of the sound of nylons was at best an "oblique reference to women."

The Commission argued that these comments, which were clearly associated with the complainant's weight, were analogous to the disparaging remarks about the complainant's weight which were made by the respondent in Whitehead, (supra). It was suggested that her supervisor's "obsession" with her weight was one of the factors that led the board to conclude that Ms. Whitehead had been discriminated against because of her sex. My reading of that case,

however, persuades me that the respondent's comments about that complainant's weight, while evidence of his hostility and, perhaps, of some bias towards overweight women in management positions such as the one to which she aspired, were not taken as independent evidence of the gender discrimination amply established by other testimony.

In any event, I have already expressed the opinion that these particular comments and mocking sounds made by Mr. Robertson were sexual put-downs. They were repeated daily over a period of years, and standing alone constitute harassment. If, because it involved neither sexual advances nor solicitations, I am wrong in finding that such harassment was "sexual", nonetheless that conduct does appear to have been aimed at the complainant as a woman and, in my view, directly so. Moreover, even if it is "at best an oblique reference to women", it is at least that and, therefore, indirect evidence of conduct aimed at the complainant as a woman.

(ii) The evidence as to respondent's views concerning working women

The Commission asserted that it was Mr. Robertson's view that married women and (or) mothers should not work outside the home, and this revealed a gender bias from which (together with the whole of the evidence) it could be concluded that he treated Ms. Shaw as he did because she was a woman.

It was suggested that it could be inferred that the respondent held these views from statements he made to that effect together with the frequent references to children made in her presence in circumstances that she felt implied that she should be at home with hers. The example she gave was his saying "some kids need Mummy to wipe their nose for them". It is not clear from that bare example whether the aim was to disparage her children's ability to look after themselves, or to insinuate that she ought to be at home with them. However, as noted earlier in another connection, when asked why she thought Mr. Robertson made such statements Ms. Shaw indicated that they were made in the context of his wife being at

home with their children. In any case, these comments were meant to be disparaging, and I dare say that counsel for the Commission was right in suggesting that similar remarks would not be made to a male victim of office harassment.

Later in her testimony Ms. Shaw said that when the respondent "was in conversation with someone else who, you know, might be talking and that and he would quite often emphasize the fact that his wife was at home with their children. ... I was left with the impression that he felt that was the best thing for a woman." Ms. Shaw also said she had discussions with Ev Millward regarding the respondent's attitude towards working women, such conversations usually occurring after they had overheard him indicating to a third person that his wife was at home with his children, raising them. Mr. Robertson's counsel asked whether in these statements he had spoken "about anybody else's wife", or had simply noted that that was where his wife was. She said that "he would leave you with the implication in his conversations that he felt a woman's/wife's place is in the home with the children." When she was asked to repeat the words that led her to that conclusion, Ms. Shaw replied, "It's from a total conversation. As I said, I can't relay the text of the conversation, I can only relay what conclusions one would draw from that particular conversation. And Ev Millward drew the same conclusion." (V. 1, pp. 177-8.)

Indeed, Ms. Millward did draw that same conclusion. She testified that "in the course of conversation he would say that he didn't think married women should be working ... we should be home" (v. 2, p. 116). Under cross-examination it was put to her that her evidence was that "from the remarks that he made from time to time you drew the conclusion that he thought married women should be at home?" The answer was "No, he actually said it." When asked whether it would be fair to say that the context in which it was said was "That's the way my house works and I'm happy with it", she replied, "I would say that was fair, yes." However, her assent to that suggestion in no way implies that those were the respondent's

words. She was quite clear as to what she heard; he actually said married women should not be working and that "we (by which she meant Ms. Shaw and herself, as she later explained) should be home." That he expressed such a view "in the context" of being happy that it prevailed in his own household does not make it any less his view.

In answer to counsel for Mr. Levac, Ms. Millward said that in his statements regarding working women the respondent's reference was to married women, not women in general. It was subsequently argued that this would at most reflect a bias against persons because of their marital status, rather than because of their sex. However, the bias thus in question is not towards persons who are married regardless of their sex, but towards women who are married. Suppose the harassment consisted of sexual aggression restricted to married victims, could it be seriously contended that it falls outside the scope of subsection 6(2) because the victim's status as a married woman was one of the reasons she was selected for such unwelcome attention? The fact that a particular group of women are singled out does not deprive the bias of its gender orientation as the cases make clear. (See, inter alia, Torres and Janzen, supra.)

When asked by his counsel about his attitude towards women working outside the home Mr. Robertson said "I've never really thought about it to tell you the truth" He then proceeded to think about it aloud, concluding that "It doesn't bother me in any way, shape or form, especially when you see there's all kinds of people around, females, that are adequately trained and certainly responsible enough to do it. I think it's great." (V. 4, p. 152.) Regardless of his perhaps belated conclusion, Mr. Robertson made statements that bespeak gender bias in circumstances in which two women who heard him were led to conclude that he held the view that married women should stay home. While he could not remember making these statements, he did not deny doing so. He was asked whether "it would be fair to say that you don't remember those conversations [regarding married women working]?", to which he

replied, "Not to the point where I could say it was said or it wasn't said." (V. 4, p. 165.)

I find that Mr. Robertson made statements that bespeak gender bias in circumstances in which two women who heard him were led to conclude that he held the view that married women should stay home. That is the natural inference to be drawn from his statements, and in the absence of some plausible explanation supported by the evidence that would displace it, that is the conclusion with which I am left.

Before leaving this aspect of the evidence I must deal with the testimony regarding Mr. Robertson's views on working women given by witnesses called on his behalf. His wife testified that she had worked outside the home briefly and that his married daughters held down full-time jobs even though they had children. Julie Slack, the respondent's young neighbour, said that she had never heard anything one way or the other about his attitude to women working outside the home. Susan Saunders testified that in assigning tasks to members of the church choir Mr. Robertson had not shown any sexual bias. She had never detected any attitude on his part against women in the work force and thought she knew him well enough that she would have been aware of such bias had it existed. Father Byrne said that he had never perceived an attitude in Mr. Robertson against women working and he, too, believed he would have discerned it had it existed.

I find the evidence of the respondent's witnesses in respect of this issue entirely speculative. Because he apparently voiced no objection to his married daughters working does not prove the absence of bias. Nor does the fact that his friend and his priest did not detect such bias and thought they knew him well enough to have done so if it existed prove its absence. Did they detect in their friend and parishioner a person who would harass a woman relentlessly for nearly fourteen years, ultimately driving her from her job, as I find to be the case? In my view their failure to

detect it in him is not proof that he was not gender-biased, nor does it counterbalance the affirmative evidence to the contrary.

(iii) The evidence as to respondent's treatment of other women

The complainant testified that sometime around 1975 or 1977 Mr. Robertson had "harassed" Ev Millward as well, but to a far lesser extent, and that "on occasions Ev broke into tears also". (V. 1, pp. 94 and 179.) Although there is nothing in the testimony of Ms. Millward either confirming or denying this, for reasons already stated I do not regard the failure to have questioned her about it as proof that Ms. Shaw's testimony was either untruthful or mistaken in that specific matter, let alone that her evidence generally was unreliable. She said that she saw Ms. Millward break into tears on more than one occasion. Given her own treatment at the respondent's hands she might have good reason to recall such an occurrence. While I am not prepared to find that Ms. Millward had been "harassed" in the legal sense solely on the basis of Ms. Shaw's observations about the effect Mr. Robertson's conduct had upon her fellow worker, those observations attest to the treatment of another woman in the office in a manner quite different from the badinage engaged in with his male co-workers.

Ms. Shaw also testified that the respondent "used to say things to [Marg Malloch]. I believe he's the one who labelled her as "The Dumb Blonde" ... She responded with statements back or comments back. You know, I don't think she let them really bother her or she was a little bit more witty and could reply back to Herb". (V. 1, pp. 96-97.) Marg Malloch's evidence in this regard was referred to earlier. Although she said Mr. Robertson did not call her a "dumb blonde", she admitted he insinuated it. While it is not clear whether she did not mind that insinuation or felt that she deserved it, her lack of protest would not deprive these remarks of their sexist quality.

The respondent's "teasing" of his friend, Susan Saunders, in the manner described seems to me particularly distasteful. Surely

the public humiliation of another cannot be justified by the victim's singular degree of forbearance. While it may be difficult to discern in that conduct any gender bias, here was yet another woman whose weight provided the respondent with an opportunity to indulge his penchant for drawing attention to a physical condition which (rightly or wrongly) is generally considered unattractive.

The only other women with whom the respondent's inter-action was considered were his wife and daughters and Julie Slack. The absence of any evidence that he displayed sexual bias towards his family members is not surprising, nor would one expect that he would have "teased" or "poked fun at" his young neighbour with whom he had no substantial social contact.

The evidence as to Mr. Robertson's treatment of other women seems to me to indicate some degree of bias against working women and, when coupled with the evidence already examined, it adds cumulative weight to the contention that he treated Ms. Shaw as he did at least in part because she is a woman.

(iv) The "fat cow" reference

I have found that Mr. Robertson used the expression "fat cow" in reference to Ms. Shaw, and Counsel for the Commission submitted that this was indicative of his attitude towards women.

I am reluctant to accept the proposition that the expression "fat cow" is sexist per se. One may choose to say hurtful things about a person not because of his or her sex, but because of personal dislike, and the form of one's invective may reflect the gender of the victim simply because of the exigencies of language. It may be difficult to produce vituperation in a gender-neutral form even if there is no gender bias. As was noted by counsel for Mr. Levac in relation to the expression "fat cow", to call a woman a "fat bull" would make no sense, and to call her a "fat member of the bovine species" would be to rob the insult of its sting. Similarly, to insult a person through mocking him or her may be accomplished through means that coincidentally reflect the victim's

sex even though the motivation is gender-free. While it seems clear that the reference is to the female sex, the issue is whether the expression was used to reflect the low esteem in which the respondent held the person Carol Shaw who happens to be a woman, or whether it was used to demean Carol Shaw (in part, at least) because she is a woman. And I do not think the bare fact of its utterance can be taken to prove which was the reason why it was said.

While similar conduct towards other women would lend support to a finding of gender bias, I reject any suggestion that there can be no finding that the complainant was mistreated because she is a woman unless the respondent similarly mistreated all women. The Torres and Janzen cases also indicate that conduct does not have to be directed to all the members of a given class in order to be discriminatory. Nor is it reasonable in my view to suggest that gender bias cannot be found unless such mistreatment of the complainant manifested itself virtually from their initial meeting. In any case, evidence of a tendency to mistreat other women has been reviewed, and in this regard the following observation made in Re Canada Post Corp. and Canadian Union of Postal Workers (Gibson) (1988), 34 L.A.C.(3rd) 27 seems apt:

[A] second form of sexual harassment is harassment aimed not at an employee's sexuality, but at the employee's gender itself. This may be harassment because the employee is of a particular gender, or harassment amounting to degradation of persons of that gender. (At pp. 43-44.)

Mr. Robertson not only degraded Ms. Shaw, but his comments were degrading of the other women working there as well. He referred to Ms. Millward as Ms. Shaw's "fridge sister" and he said or insinuated that Ms. Malloch was a "dumb blonde".

That Mr. Robertson's treatment of the other women in the office was not particularly severe is not something that in my view must be explained away by the complainant in order to prove that his treatment of her was sexist. Nevertheless, the evidence

provides a basis upon which an explanation can be made. In argument, counsel for the Commission made the point in these terms:

... Carol Shaw was viewed as being competent and this may have been regarded as threatening by him. Another reason is that she was much more clearly his colleague than either Ev Millward who worked part-time and consequently didn't enjoy the same sort of employment status as he does; or Marg Malloch who came much later than Herb Robertson and clearly viewed him as being her superior. There's also the evidence that Carol didn't feel she was particularly quick witted so that the respondent found that he had a particularly vulnerable victim in this case and could insult and degrade. And rather than it being "like water off a duck's back", as other witnesses have testified, he saw that it clearly bothered her and he got a response. He could get at her the way he couldn't get at other employees. (V. 5, p. 37.)

Mr. Robertson, as a bully, was unlikely to pursue a course of conduct that would not succeed in discomfiting his victim; nor was he likely to select a victim whose susceptibility has not been established. Of the three women working at Levac Supply Ms. Shaw was the only target who proved vulnerable.

From the foregoing analysis it is clear that I must answer in the affirmative the question whether, if the conduct was not sexual harassment, it was nonetheless harassment because of sex. In this regard I would like to paraphrase the passage quoted above from the Toth case regarding circumstantial evidence: conduct to be found harassment in the workplace because of sex must be consistent with the allegation of such gender based harassment and inconsistent with any other explanation.

The evidence adduced at this hearing, to say the least, is entirely consistent with a finding that the harassment was because of sex, and such a finding is not in the least inconsistent with any other explanation. Only three other explanations were even remotely suggested by the evidence and, of these, the one advanced by the respondent in explanation of his conduct was altogether unbelievable. The other two were quite implausible. He did not

torment her to tears for fourteen years as a management technique for the good of the company. Nor can it be found that he treated her as he did because he disliked the person called Carol Shaw who simply happens to be a woman. Not only did he deny that that was the case, but he had no basis for such purely personal dislike. While one might be prepared to find that anyone who acted as he did must have disliked his victim, the only reason for such dislike suggested by the evidence is that she was a woman. While the complainant at one time thought that his behaviour was sparked by jealousy, he denied that this was ever the case. There is nothing in the evidence to suggest the contrary. Thus, I find on a balance of probabilities that the respondent harassed the complainant in the workplace "because of sex".

It is to be noted that in arriving at that conclusion I have not relied at all on the evidence offered by Mr. Astrachan, the expert witness called by the Commission. However, as his evidence confirms me in the opinion that I have reached independently of it, I feel required to review it briefly.

(2) The Expert evidence of Mr. Astrachan.

The Commission called Mr. Anthony Astrachan as an expert witness competent to give opinion evidence with respect to the issue whether the respondent's conduct was engaged in "because of sex". He was examined by counsel at length with respect to his qualifications and, after hearing argument, I decided that he was qualified to give such evidence.

Mr. Astrachan is the Executive Feature Editor of a newspaper for primary care doctors in the United States called "Medical Tribune". He is the author of the book "How Men Feel: Their Response to Women's Demands for Equality and Power", published by Doubleday in 1986. Although Mr. Astrachan's background is journalism, rather than sociology or psychology, his book was prepared over a period of nine years during which substantial blocks of his time were devoted exclusively to that enterprise.

This was made possible by grants from both the Rockefeller and Ford Foundations for which he had to compete against applicants from academia. In the course of his research Mr. Astrachan was required to read extensively in the areas of sociology and psychology and he spent some time in the Centre for Policy Research directed by Professor Amitai Etzioni at Columbia University. He was provided with office space and attended weekly meetings which involved the discussion of his work in progress. During this time he also co-authored an academic paper with Professor Etzioni.

Mr. Astrachan's book, which was described in the Washington Post as a pioneering endeavour, has been well received, as was shown by a number of book reviews filed as exhibits. It has been cited in articles in such legal periodicals as the Yale Law Journal. The author has since lectured extensively in universities and at various seminars concerned with the subject matter of his book which (according to his resume) "focuses on the male response to the growing number of women in traditionally masculine jobs and on related changes in marriage, child-raising and sex". The book provides an analytical framework within which to consider male conduct towards women in the workplace. It is based upon interviews with nearly four hundred people as well as on references to other relevant studies and commentary. It does not purport to provide statistics based on scientifically proven polling methods whereby one can state the likelihood of a man in a given employment situation reacting in a particular manner towards women. But it does establish a framework within which the range of reactions can be placed and understood regardless of the statistical frequency with which any of them is likely to occur. Nevertheless, the author felt prepared to draw broad conclusions as to why a man might have acted towards a female co-worker in some particular way.

The respondents objections to Mr. Astrachan's evidence being received were based on his lack of relevant academic qualifications and the absence from his work of scientifically verified statistics culled from the results of authenticated polling methods. It was

also argued that because the issues in these proceedings were not of a scientific nature such evidence was inadmissible because unnecessary.

In my view, Mr. Astrachan's lack of conventionally appropriate academic credentials does not disqualify him as an expert in the matters in question. Indeed, the subject area of his "pioneering" book is one in which he may be ahead of professional academics generally, and I had no hesitation in accepting him as an expert in this area. As stated in The Law of Evidence in Civil Cases (Sopinka and Lederman, Butterworths, at p. 310):

The test of expertness so far as the law of evidence is concerned is skill in the field in which it is sought to have the witness' opinion. The admissibility of such evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject matter at issue, the court will not be concerned about whether his skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

In support of the argument that Mr. Astrachan's evidence should be excluded because of its lack of any scientific basis in relation to polling methods, counsel for Mr. Robertson referred to the decision of the Manitoba Court of Appeal in R. v. Prairie Schooner News Ltd. and Powers (1970), 75 W.W.R. 585 and the decision of the Ontario Court of Appeal in Regina v. Times Square Cinema Ltd., [1971] 3 O.R. 688. These cases dealt with the use of polls or surveys in establishing a community standard in relation to the matter of obscenity. However, as Mr. Astrachan's book did not purport to be or contain an opinion poll or survey, nor was he expected to base his opinion regarding male attitudes on polls or surveys conducted by himself, these two cases were inapplicable.

As to the suggestion that the issue regarding which his evidence was sought did not require an expert's opinion, counsel referred to the following passage from the judgment of Lawton L.J. in R. v. Turner (1974), 60 Cr. App. R. 80, at p. 83, which was

quoted with approval by Dickson J. (as he then was) in R. v. Abbey, [1982] 2 S.C.R. 24:

... An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.

One of the difficulties I had with that submission was that at the time Mr. Astrachan's testimony was tendered the respondent's evidence had yet to be heard and the facts to be assessed were neither proven nor complete. Although in the end I was able to reach a conclusion without reference to Mr. Astrachan's evidence, the drawing of an inference as to why Mr. Robertson acted as he did might well have required technical assistance in circumstances less clear than those before me proved to be. The history of human rights litigation has made plain that the general background even of the fair minded may carry with it preconceptions occasioned by popular belief. The point was made in these terms by Madame Justice Wilson in R. v. Lavallee (1990), 55 C.C.C. (3rd) 97 regarding the so-called "battered wife syndrome":

The need for expert evidence in these areas can, however, be obfuscated by the belief that judges and juries are thoroughly knowledgeable about "human nature" and that no more is needed. They are, so to speak, their own experts on human behaviour. (P. 111.)

In any case, in respect of a hearing under the Code I find more apt the view that the "hallmark of admissibility simply should be whether the expert's testimony would be helpful to the tribunal". (The Law of Evidence in Civil Cases, *supra*, p. 308.) Under section 15 of the Statutory Powers Procedure Act of Ontario the tribunal may admit any oral testimony provided it considers it relevant. The evidence of Mr. Astrachan was relevant and since it appeared likely to prove helpful to me I concluded that he should be qualified as an expert and his testimony admitted and given such weight as in the end it might appear to warrant.

Mr. Astrachan began his testimony with the observation that, since their work is a major part of their sense of masculinity and identity, men frequently feel threatened by the presence of women in the work force and may experience a range of feelings, of which some may be "negative" (anger, fear, anxiety, envy, shame and guilt) while others may be "positive" (acceptance, support, identification).

Men can be divided into four groups in relation to their general feelings towards women in the work force: the supporters, the pragmatists, the ambivalents and the opponents. The supporters are generally positive about women's demands for equality. The pragmatists accept a role for women in the work force as a practical matter, such as the need for a double income in their own situations. The ambivalents merely pay lip service to sexual equality in the work force and in fact experience discomfort in their presence in the workplace. The opponents argue (often vigorously) that women have no proper place in traditionally masculine occupations. "But even the strongest supporters of women's independence and power sometimes show negative feelings because our culture has for thousands of years suggested that men rank higher, are more powerful than women, that certain occupations belong to men, and when women enter these occupations for many men it's very disturbing". (V. 3, p. 113.)

Although he claimed no statistical accuracy in projections from his figures, he indicated that in the cases he had studied sixty percent of the men fell into the "ambivalents" and "opponents" groups and that negative feelings towards women in the workplace predominate. He also indicated that, since men over forty grew up and were formed before feminist ideas began to receive general acceptance, they are the age group that finds it hardest to accept women in the work force. Mr. Astrachan went on at length to explain why these various feelings arise, and he said that they manifest themselves in the form of three main kinds of

reactions: hostility, transformation and denial.

Mr. Astrachan gave examples of the hostile kinds of reactions he had encountered, ranging from sabotaging a woman's equipment to make her look inept to sexual insults and aggression. "Hostility could also take the form of asserting power over women, giving women orders, making comments on their performance. If a man insults a woman, even in a totally non-sexual way there's a question of why is he doing this. Is her work really so bad? Is he doing it because she's a woman? ... a tendency to insult a woman or women in general in the workplace, to impugn the quality of their work, to talk about their personal appearance, I think these are part of men's hostility to women in their own occupations. Sarcasm may be a part of it." (V. 3, pp. 120-123.)

Relating this to Mr. Robertson's conduct, the evidence is that he acted in a hostile manner towards Ms. Shaw by sarcastic gibes, by insulting her appearance and by groundlessly belittling her competence. Did he do this because of a personality conflict having nothing to do with the fact that she is a woman? In Mr. Astrachan's opinion, in situations of conflict in the workplace between opposite sexes it would be "necessary to eliminate all possibility of gender-associated conflict before finding it was merely a matter of personality." (V. 3, p. 129.) In other words, he would begin with the assumption that the conflict was gender based, and only if the evidence eliminated that possibility would he find otherwise. As to that specific point I approached the matter conversely, finding on a balance of probabilities that, all other explanations for his behaviour having been first eliminated, and having regard to the whole of the evidence, Mr. Robertson's harassment of Ms. Shaw in the workplace was because of her sex.

Mr. Astrachan, who had reviewed the transcript of the evidence adduced by the Commission, was questioned about the respondent's use of the expressions "waddle, waddle" and "swish, swish". His answer was as follows:

[T]o me this is a way of saying "You are a woman, you are an unattractive woman ... because you're waddling, because your nylons swish and an attractive woman's nylons don't make a sound, or at least don't make a sound I make fun of. ... Why are you messing up my workplace?" (V. 5, p. 132.)

The witness was asked in cross-examination whether in light of evidence that Mr. Robertson "needled and joked" with everyone regardless of sex, often beyond an acceptable point, the respondent could be fitted into any of his categories. The answer was that, even if he teased everyone, that would not mean he would not fall into any of the categories in question, since it would depend on just how he treated men and women. "For instance, Reg Taylor, as I remember, was the man who ate too much. I didn't see anything in the transcript about his saying "waddle, waddle" to Reg Taylor, but he did say it to a woman. To me, that's a sexually charged remark". (V. 5, p. 147.)

When questioned about the reaction labelled "transformation", Mr Astrachan explained that "the combination of competence and sexuality is frightening to some men. If they can make the sexuality obliterate the competence or transform the sexuality into some familiar thing, whether it's wife or mother or lover or whore, it's another way of detaching this combination." (V. 5, p. 126.) After developing this theme in the light of various examples of "transformation", the witness said that the alleged use of the expression "fat cow" might be an example of transformation. While it is a denial of sexual attractiveness, it is an affirmation of sexuality. "A "fat cow" is an unattractive female animal. ... and a cow is, of course, a symbol of motherhood, milk-giving, it's loaded with overtones".

Referring to specific cases within his experience, Mr. Astrachan stated that it was not unusual for men to express their hostility in some delayed fashion, and the majority of men he interviewed focused their hostility towards one woman. (See v. 5, pp. 142-143.)

Mr. Astrachan identified five broad categories of occupations and dealt with the differences in the reactions of men in each of these groups. From his reading of the transcript, Mr. Astrachan said he would be "more inclined to put Mr. Robertson in the service category than in the executive category". Under cross-examination by counsel for Mr. Levac, the witness acknowledged that his book focuses on men's reactions to women moving into traditionally male occupations. Generally white-collar workers were more likely to express positive feelings than were blue-collar workers, although there was really no difference between them within the service industries, and he said that men in service industries displayed more positive feelings than men in the other categories. Mr. Astrachan agreed that the bookkeeping responsibilities of Ms. Shaw seem no more associated with one sex than the other and was not, therefore, typical of the work engaged in by "most" of the women towards whom his "interviewees" had been reacting. There then ensued the following exchange:

- Q. Let us assume we have a man who is employed in a white-collar service occupation in a field such as bookkeeping ... would he not be more likely to express positive feelings to a woman than a man outside the white-collar service occupation in a traditionally male field, based on your interviews and your experience?
- A. Yes. If you talk about men in such a field, yes, on the basis of my findings they would be likely to accept -- express positive views.
- Q. Would the fact that a particular person did not do so necessarily imply that he was therefore gender biased?
- A. No, not necessarily. I might think there was a high probability, but not necessarily.

In my view, the weight of Mr. Astrachan's evidence as it applies to specific instances of Mr. Robertson's conduct is somewhat diminished by the circumstance that Ms. Shaw's was not a traditionally male occupation and he was a white-collar worker in

a service occupation. However, in my opinion that evidence does tend to confirm the conclusions I have reached without having had to rely on it.

For all the foregoing reasons I find that Mr. Robertson harassed Ms. Shaw in the workplace because of sex, and it remains to determine the extent of his liability therefor.

III. THE REMEDY AS AGAINST MR. ROBERTSON

A. Damages for Mental Anguish

Having concluded that Mr. Robertson's behaviour towards Ms. Shaw constituted an infringement of her rights under sections 6.- (2) and 8 of the Code, the extent of his liability must now be addressed. Since he knew the unwelcome character of his conduct and deliberately persisted in it I find that he acted wilfully, thereby attracting liability for damages for mental anguish. Even assuming doubt as to his actual knowledge of the disagreeable character of his conduct (and I have none), it is clear that he ought reasonably to have known that his behaviour was unwelcome, in which case he acted recklessly. His conduct "was such as to evince disregard of or indifference to consequences, that is the conduct [was] done with rashness or heedlessness" and would come within the scope of section 40.-(1)(b) of the Code. (See: Cameron v. Nel-Gor Castle Nursing Home and Nelson, (1984) 5 C.H.R.R. D/2170, at para. 18546.)

Awards of general damages for infringements of the Code reflect not only the mental anguish which wilful or reckless conduct may cause, but elements of pain and suffering and the injury to the complainant's dignity and self-respect as well. The Torres case (supra) provides the following helpful list of factors to be considered in assessing such damages, which factors were applied in the Cuff case as well:

- (a) The nature of the harassment, that is, was it simply verbal or was it physical as well?
- (b) The degree of aggressiveness and physical

contact in the harassment.

- (c) The ongoing nature, that is, the time period of the harassment.
- (d) The frequency of the harassment.
- (e) The age of the victim.
- (f) The vulnerability of the victim.
- (g) The psychological impact of the harassment upon the victim.

While the quantum of general damages to be awarded in any given case must reflect its unique circumstances, it is usual to have regard to the awards of other boards of inquiry. For instance, in the Torres case, decided eight years ago, an award of \$1,500 was made to a quite vulnerable young woman in respect of harassment which was primarily verbal but lasted only for a period of three to four weeks. In the Cuff case, decided three years ago, the victim was "somewhat vulnerable" and there was both verbal and physical harassment over a period of about six months. The award for general damages was \$2,000. In considering these and other cases it must be borne in mind that the quantum of such awards has been increasing over the years. Tribunals have taken into account the effect of inflation, lest it convert into mere license fees sums that might once have been appropriate, and they reflect as well changing perceptions as to the gravity of the injury implicit in such assaults upon human dignity. (In this regard see, for instance, Cameron v. Nel-Gor Castle Nursing Home and Nelson (1985), 5 C.H.R.R. D/2170, and Underwood v. Board of Commissioners of Police for the Town of Smiths Falls (1986), 7 C.H.R.R. D/3176.)

As to these various factors, I have noted that, although the harassment was verbal only, it was engaged in over a period of nearly fourteen years, and it occurred virtually daily, and with considerable frequency each day. Ms. Shaw's vulnerability was likely one of the reasons she was the target of this harassment, but there was no evidence of any lasting psychological harm. In

addition to these factors any physical ill effects induced by the harassment, such as this complainant's migraine headaches, must be given considerable weight. The evidence shows that Ms. Shaw suffered from two kinds of migraine headaches, the more severe type being caused by a condition unrelated to the respondent's conduct while the other was found by the specialist who examined her to be stress-related. There was no evidence that Ms. Shaw was subject to any stress that would occasion these headaches other than that occurring in the workplace, which was clearly caused by Mr. Robertson's harassment.

While an award of \$7,000 as requested by the Commission seems to me somewhat excessive, in the light of the factors to which I have had regard the circumstances before me are such that an award of \$5,000 as general damages seems appropriate.

B. Damages for the Financial Losses Arising

The evidence leads as well to the conclusion that Mr. Robertson's conduct was a cause in fact of Ms. Shaw's having left Levac Supply when she did, thereby incurring losses relating to the premature termination of her employment. The complainant concluded her letter of April 14th, 1985, with the observation: "I hope to work here until I reach retirement age" (Exhibit 7). She enjoyed working with the other employees (save Mr. Robertson), and the pay and benefits were far better than in comparable jobs elsewhere. (In fact at the time of the hearing her pay in her present employment was less than she was receiving when she left Levac Supply three years earlier.) Ms. Shaw testified that she retained that hope until finally driven to abandon it by Mr. Robertson's conduct. She was very unhappy with her changed workload after breaking her ankle and that might have had a hastening effect on her decision. However, in the context of continuing with these changed duties she asked Mr. Levac to station her in the newly constructed office instead of having her return to the general office. Had that been done the harassment might have ceased or

been significantly abated and she might have stayed on. In any case, but for his conduct she would not have left her employment and incurred the losses in question, and it is unnecessary that the infringement of her right be the sole cause of the harm complained of. (In addition to the decisions in the McAra and Whitehead cases, supra, see: Ianco v. Simcoe County Board of Education (1983), 4 C.H.R.R. D/1203, and R. v. Bushnell Communications Ltd. (1973), 45 D.L.R. (3rd) 218, at 223, aff'd (1974), 47 D.L.R. (3rd) 668.)

Although the harassment was a cause in fact of the premature resignation and any attendant losses, was it the legal cause of such losses? Counsel did not address the question of causality (proximity and remoteness) regarding claims for compensation under section 40.-(1)(b) in respect of an infringement of subsection 6(2). Although clearly comparisons with tort law are not truly apt (see Robichaud, supra), is the intentional wrong implicit in wilful harassment such that the respondent is liable for all damage actually caused whether reasonably foreseeable or not, or must the harm caused by the harassment be of a kind that was reasonably foreseeable? May some actual losses caused be regarded as too remote to be compensable?

Section 40.-(1)(b) states that a board "may ... direct the party to make restitution, including monetary compensation for loss arising out of the infringement". That wording indicates that the operative principle is restitution/compensation, the purpose being to restore the complainant to the position he or she would have been in had it not been for the infringement. The fulfilment of that purpose requires compensation for actual losses, and had it been intended to restrict compensation to foreseeable losses that limitation would no doubt have been spelled out. However, the importation of tort and contract law principles into the field of human rights legislation was considered sympathetically in Torres (supra) where the board said that "[T]here are analogous issues in tort law and contract law, of course, where damages are limited to

those reasonably foreseeable to the wrongdoer. It seems to me, at first impression, that these principles are appropriate to awarding general damages under the Code". And in Canada (Attorney General) v. McAlpine and the Canadian Human Rights Commission, [1989] 3 F.C. 530, the Federal Court of Appeal relied on the reasoning developed in Torres in relation to that view. In McAlpine, the relevant issue was whether a woman who was wrongly refused employment because she was pregnant could recover the sums she would have received under the Unemployment Insurance Act as maternity benefits had she been hired and then later taken maternity leave. Section 41.(2)(c) of the Canadian Human Rights Act refers expressly to compensation for "wages" and it was held that, since foregone unemployment benefits are not wages, that loss was not compensable. However, the court went on to say that even if not excluded on that ground these benefits would not be compensable because they were not a reasonably foreseeable consequence of the discrimination. While one may be puzzled by the finding of fact, the principle seems clear. The court accepted that the object of the legislation is restitutio in integrum, but stated that:

... The proper test must also take into account remoteness or reasonable foreseeability whether the action is one of contract or tort. Only such part of the actual loss resulting as is reasonably foreseeable is recoverable.

Unlike the board in Torres, I have had the advantage of the intervening judgment of the Supreme court of Canada in Robichaud (supra) in which La Forest J. made the following observations:

The interpretative provisions I have set forth seem to me to be largely dispositive of this case. To begin with, they dispose of the argument that one should have reference to theories of employer liability developed in the context of criminal or quasi-criminal conduct. These are completely beside the point as being fault-oriented, for, as we saw, the central purpose of a human rights Act is remedial - to eradicate antisocial conditions without regard to the motives or intention of those who cause them. (Para. 33938, D/4330.)

These cases were recently reviewed in Cashin (supra) where the board made the following statement immediately before quoting the above passage from Robichaud:

The merits of McAlpine, supra, aside, it seems on its face to be inappropriate to apply the tort test of foreseeability to damages for discriminatory acts. The Supreme Court of Canada has stated in Bhaduria v. Board of Governors of Seneca College (1981), 124 D.L.R. (3rd) 193, that there is no tort of discrimination. Moreover, that court has also expressed the view that one should not try to fit human rights remedies into inappropriate legal doctrines. ... (At D/233, para. [35].)

The view taken by the board in Cashin seems to me both sound and applicable in respect of the Ontario Human Rights Code. In my opinion, its foreseeability is not a condition of liability for harm actually caused by an infringement of the Code. Where the board is clothed with a discretion to determine whether to make any award and in what amount if any, that discretion, rather than the test of reasonable foreseeability, is the only limiting factor. It may be, of course, that a board might have regard to reasonable foreseeability as one of many considerations to be weighed in the exercise of its discretion; but that is a separate matter.

Although for the foregoing reasons I do not find it necessary to deal with the matter in order to determine compensability, lest I be found wrong in that regard (and since it may be relevant to quantum), it happens that in the circumstances of this case I find the losses claimed herein as special damages to be of a kind that were reasonably foreseeable.

To begin with, it is clear that the complainant's lost wages, incurred while she was seeking alternative employment, constitute harm of a foreseeable kind arising from her being driven out of her employment by the harassment. That loss, in the undisputed amount of \$10,902.43, is of a compensable kind in the context of the Code. For reasons already alluded to, I do not agree with the suggestion that, as might be the case in respect of contractual claims for wrongful dismissal in which the employer's obligation was to give

adequate notice, compensation for lost wages should be limited to the period of such notice. While reinstatement may not be possible or appropriate restitution is the principle upon which compensation under the Code is to be measured. Accordingly, subject to the necessity of mitigating the loss (as was done in the instant case), a complainant is entitled to recover lost wages up to the time of re-employment. (See the Whitehead and Cuff decisions, supra.)

In this case the claim for special damages was not limited to lost wages. It was alleged by the Commission that there was an additional financial loss suffered by the complainant in relation to the profit sharing plan for which Mr. Robertson (and the other respondents) are responsible.

The basis of this second claim is that, had it not been for the harassment, Ms. Shaw, who was forty-one years of age at the time, would have remained at Levac Supply until she attained fifty-five, at which age she could retire without incurring the "penalty" under the plan. Under that plan the employee accumulates annually a certain monetary entitlement which can be calculated at any point of time. However, the full amount of that entitlement as it may be from time to time cannot be realized before age fifty-five, unless earlier retirement is caused by disability, in which case the full amount will be received. An employee who for any other cause retires before age fifty will have the equivalent of five years of the accumulated entitlement deducted from the amount he or she will actually receive. That five year "penalty" decreases by one year for each year the employee remains beyond age fifty.

By June of 1987, Ms. Shaw had an accumulated entitlement in the profit sharing plan of \$54,018.02. Had she left because of disability that is the amount she would have received. However, in her case the five year "penalty" applied and she received only \$21,647.45, the difference being \$32,370.57. The contention is that Ms. Shaw would have remained at Levac Supply until at least age fifty-five, and that that shortfall or differential is a loss

that would not have occurred but for her having been driven out of her job by the harassment.

Actually, in my view, it is unnecessary to postulate Ms. Shaw's remaining at Levac supply for that long in order to be able to retire and receive a sum from the plan in the approximate amount of \$54,000. Had she remained another five years and then left for some purely personal reason her entitlement would have increased by an amount equivalent to the sum now claimed. She would still have incurred a five year penalty upon resigning in 1992, but that penalty would be deducted from a total that would be five years greater than it was in 1987.

Counsel for Mr. Robertson did not address this question, and counsel for Mr. Levac was extremely tentative about it, saying only the following:

I think, given what I've said about Ms. Shaw's plans, given the serious health problems she had, and I refer to the headaches, it's a matter of speculation as to whether she would have stayed on until retirement. Of course, we don't know whether she would have died or become disabled, and I have no actuarial statistics to suggest one or the other, but I think that factor should be taken into account, the probability of whether she would have gone to retirement. (V. 5, p. 157.)

Although it is clear that Ms. Shaw was driven from her job by the harassment, the suggestion is that whether she would have remained another fourteen years is speculative. That is certainly true, but I am not sure that it is relevant in this kind of situation. If we could look into the future and know that neither inclination nor illness, disability nor lawful dismissal, could intervene so as to prevent Ms. Shaw from staying on at Levac Supply until the year 2001, she might perhaps assert a claim far in excess of that which she is now making. Indeed, one might speculate that, had she not resigned in June she might have been disabled in July, in which event she would have received the full \$54,000. Or if we were to surmise that, but for his conduct she would have remained working there until 1992, then once again she would have obtained

approximately that amount. The imponderables make it impossible to calculate with precision the exact financial losses that the complainant has incurred as a consequence of the respondent's conduct, but that she suffered losses beyond lost wages is apparent, and they ought to be calculated as fairly as possible and compensated for. There is an inescapable element of speculation in all damage awards that bear upon the future, as so many of them do. However, a wrongdoer can hardly complain where such losses are taken into account as fairly as possible having regard to the normal expectations arising in the circumstances of the case.

But counsel's reference to the speculative character of this particular loss is apparently narrower and more specific than the basis upon which I have just reviewed it. He suggests merely that what makes the complainant's claim speculative is not the nature of the claim but rather the "iffyness" of her staying on for fourteen years because of her plans and serious health problems. I have found as a fact that she had no plans inconsistent with remaining indefinitely at Levac Supply. Her migraine headaches were not such a serious problem as to have prevented her from doing so, particularly had the harassment been discontinued. Indeed, she has been steadily employed elsewhere from the earliest opportunity available to her.

In my opinion, Ms. Shaw wanted to remain at Levac Supply for the foreseeable future, expecting to reach normal retirement there - in which case a five year penalty would not have occurred. In my view the only burden on the complainant with respect to this issue is to prove on a balance of probabilities that she would have remained at Levac Supply for at least five more years but for the harassment. She has done that. Moreover, what is being complained about is not simply some future loss, but the instantaneous devaluation of her entitlement under the plan occurring with the act of resignation caused by the respondent. Thus, I find that this particular loss of which Mr. Robertson's conduct was a cause in fact is compensable and since, even assuming it to be a

necessary condition, it was of a kind that in my view was foreseeable, he is liable for it.

In order for the respondent's conduct to be their proximate cause it is unnecessary that the exact losses that occurred were reasonably foreseeable. As long as such losses are of the kind that were foreseeable they are not too remote. I do not think it proper to define the kind or category of loss so narrowly as to make it almost necessary to foresee the exact loss. In my opinion, the kind of loss of which the shortfall in the profit sharing pay out is an instance is "financial damage attendant upon loss of occupation". That kind of loss was a reasonably foreseeable consequence of the conduct, and the specific loss here in question was of that kind. Moreover, Mr. Robertson, as a participant in that same plan, was well aware of its broad terms and must have known of the penalty provision. Thus, in treating the complainant as he did, he knew or ought to have known of that specific risk.

As to the exercise of my discretion in determining the amount of the award, I find no proper grounds on which to order an award that would be less than the amounts claimed for special damages. As I have indicated, far more extensive losses might be postulated on the basis that she was prevented by the infringement from staying at Levac Supply until age fifty-five. Attempts could be made to project her earnings in her present occupation from the time of her resignation to age fifty-five, subtracting that amount from the total benefits and earnings that she would have obtained had she instead remained for that period of time at Levac Supply in order to arrive at the losses. Whether because such losses could be regarded as too remote or not, I would exercise my discretion against awarding damages for them and limit the award in respect of this particular loss to the amount claimed. However, I would not exercise my discretion by awarding less, since driving her out of the plan as well as her job was the direct consequence of the conduct, and that amount was both the immediate and the least financial loss suffered by reason of having to abandon that

plan along with the job.

The financial impact that this award will have upon the now retired Mr. Robertson is regrettable. However, it is clear that the object of the legislation is to effect restitution and I do not see how I can regard his personal circumstances as a legitimate consideration for awarding less than is required to meet that objective. As was pointed out in Boehm (supra), even though the respondent:

... did not intend or realize the catastrophic impact of his vexatious comments and conduct upon the complainant, knowing and intending that such comments would hurt, he must bear responsibility for all the consequences that ensued from his actions. (At p. D/4122, para. 32572.)

In all the circumstances of this case I find that the respondent, Mr. Robertson, is liable to the complainant, Ms. Shaw, in the amount of \$48,273.00, consisting of \$5,000 in general damages and \$43,273.00 in special damages. The award of \$10,902.43 attributable to lost wages is subject to the repayment of the unemployment insurance benefits received by the complainant during her period of unemployment and, as counsel for the Commission noted, these awards are also subject to any applicable income tax provisions. Since no amount was requested in respect of interest, and having regard to the magnitude of the total ^aaward herein, none will be ordered.

Whether, as regards all or part of the damages awarded to Ms. Shaw, Mr. Robertson is solely liable, or is jointly and severally liable with the other respondents, must now be considered.

PART THREE - THE LIABILITY OF ROGER LEVAC

The evidence regarding Mr. Levac's knowledge of and reaction to the harassment of Ms. Shaw has already been dealt with at length. Whether or not the word "harassment" was then a part of his vocabulary, he knew of the mistreatment of the complainant by Mr. Robertson. He testified that from personal observation while in the general office he knew as early as 1978 that they were "not

getting along". What it was he observed that led him to that conclusion he did not say; but we know what others observed when they went into the general office, and it seems likely that he witnessed the same sort of thing. Although Ms. Shaw could not recall telling him the details of other instances of harassment besides the "swish, swish" episode she thought that she probably had. But from that episode alone he knew, or ought to have known, the degrading nature of the conduct in question. Indeed, any failure to have known of it in more detail must be attributed to wilful ignorance behind which he cannot take refuge.

Despite this knowledge Mr. Levac professed that he saw the situation as simply a personality clash, and he felt that as long as their level of performance was satisfactory the interpersonal problems of these two employees were not his concern. I do not accept that rationalization. He knew one of them was mistreating the other in the workplace and he simply failed in his duty to take proper steps to put a stop to it. In my opinion, by permitting that harassment to continue he became party to it thereby harming not only the complainant but, ultimately, Mr. Robertson as well, since a timely intervention would have averted most of the consequences the latter now faces.

The complainant repeatedly requested Mr. Levac to take action to end the harassment. Since it was obvious that he was not going to curb Mr. Robertson's conduct, she asked Mr. Levac to station her elsewhere when the renovations were completed. He did not do that. Nor did he return her to her old duties because, he says, even after seven months Marg Malloch needed more experience with the accounts receivable. Instead, he returned Ms. Shaw to the general office to carry out assignments that brought her into closer contact with Mr. Robertson than ever before. And he did this knowing of the harassment that was going on. As counsel for the Commission observed, his conduct seems tantamount to constructive dismissal.

Counsel for Mr. Levac submitted that even if the circumstances were such as to warrant finding that he, too, had harassed Ms. Shaw, unless Mr. Levac had actual knowledge that the harassment was because of sex he could not be held to have infringed sections 6.- (2) and 8 of the Code. He argues that not only did Mr. Levac not know that Mr. Robertson was harassing Ms. Shaw because of her sex, but that he could not reasonably be expected to have known. After all, he asserted - and accurately, so far as the commencement of the course of conduct is concerned, even Ms. Shaw did not realize that she was being harassed because she was a woman.

On the other hand, although Mr. Levac was unfamiliar with the provisions of the Code, since he was privy to the circumstances that have led me to conclude that the harassment was because of sex and, if he did not know, he ought to have known that to have been the case. Surely he is to be estopped from relying on lack of actual knowledge attributable to his breach of duty. It seems to me as well that what is required to find that a supervisor has abetted the infringement of subsection 6(2) of the Code and is to be held equally responsible for the harassment that it was his duty to prevent is not the conscious awareness that the conduct is because of gender, but simply the awareness of conduct of such a character that it is found to be because of gender.

While I am prepared to conclude that Mr. Levac's conduct was in itself a direct infringement of the complainant's right under subsection 6(2) of the Code, it seems to me that he has in any event infringed that right indirectly.

In Wei Fu v. Ontario Government Protection Service (1985), 6 C.H.R.R. D/2797, following a careful review of the law, Professor Cumming set out several types of situations in which an employer would be personally in breach of the Code, the third of which is set out at D/2800 (para. 22922) as follows:

(3) Where the individual employer himself takes no direct action of discrimination but authorizes, condones, adopts or ratifies an employee's discrimination, than the

employer is himself personally liable for contravening the Code ... as it is the employer himself who has infringed or done, directly or indirectly, an act, "that infringes a right under this part" (section 8). Section 8 of the Code says "No person shall infringe or do ... anything that infringes a right..." The employer is infringing or doing something by its mere passive inaction of allowing an infringement of a right in the workplace when the employer could rectify the situation. To do nothing can be, in the circumstances, to "do" something that "infringes a right" within the meaning of section 8.

I see no obstacle to applying this same reasoning to Mr. Levac. While he was not in law the "employer", there is no reason in principle to regard this particular statement as applying narrowly to employers only. It is at bottom a statement as to what may amount to an indirect infringement of the Code. In my opinion, a person who, whether as employer or supervisor, has the authority and duty to prevent wrongful conduct in the workplace, which conduct happens to constitute an infringement of the Code, and without lawful excuse fails to do so, thereby indirectly infringes the right in question. I would go further and say that it is unnecessary for that person to have either actual or constructive knowledge that the conduct amounts to the infringement. Perhaps knowledge that Mr. Robertson had harassed Ms. Shaw "because of sex" would be required for Mr. Levac's acquiescence to be the doing directly of something that infringes her right under Part I of the Code. However, by facilitating, permitting or acquiescing in (or "authorizing, condoning, adopting or ratifying") wrongful conduct which (whether he knew it or not) constituted such an infringement, he did something indirectly that infringed the right.

Having for these reasons concluded that Mr. Levac contravened section 8 of the Code, I turn now to the question of the order I am empowered by section 40.-(1)(b) of the Code to make with respect to that finding. I have no hesitation in saying that he must be held jointly and severally liable for the financial losses arising out of the infringement referred to when dealing with Mr.

Robertson's liability. The position is not so clear regarding the damages awarded to Ms. Shaw for mental anguish, and counsel submitted that even if Mr. Levac were liable for the other heads of damage (if I may so put it), he could not be liable for an award in respect of mental anguish because he did not infringe Ms. Shaw's right wilfully or recklessly.

According to section 40.-(1)(b) of the Code, it would indeed appear that Mr. Levac cannot be required to share liability for the award of damages in respect of mental anguish unless he acted wilfully or recklessly himself. However, implicit in the finding that Mr. Levac contravened section 8 by infringing Ms. Shaw's right under subsection 6(2) is the conclusion that (either directly or indirectly) he harassed her in the workplace because of sex. It is clear that his failure to control Mr. Robertson was in reckless disregard of the very predicament against which he had a duty to protect her, and so I am satisfied that his "infringement has been engaged in wilfully or recklessly."

PART FOUR - THE LIABILITY OF LEVAC SUPPLY LTD.

It was argued that Levac Supply could not be vicariously liable because of the protection from such liability afforded by subsection 44(1) of the Code which reads as follows:

44.-(1) For the purposes of this Act, except subsection 2(2), subsection 4(2), subsection 6 and subsection 43(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

This provision is generally taken to mean that the doctrine of vicarious liability applies in respect of all conduct prohibited by the Code except harassment. Thus, if the corporate respondent is to be liable at all it can only be through application of the "organic theory" of corporate liability by which the acts of one

of its officer's, as a "directing mind" of the company, may be attributed to the corporation. (See, for instance, Wei Fu, supra, and the cases referred to therein.) It follows that, unless Mr. Levac, as one of its "directing minds" (indeed, the principal one), had acted in such a way as to make the infringement that of the company as well, then Levac Supply cannot be liable to the complainant.

While the decision of the Supreme Court of Canada in Robichaud (supra) is of significance to certain aspects of these proceedings, it would not appear to afford the Commission and the complainant a way around section 44.-(1) of the Code. Robichaud stresses the importance of holding the employer liable for infringements of human rights legislation because the purpose of such enactments is to compensate the victim rather than to punish the wrongdoer, and employers are best able to effect the remedial measures called for. It was declared that, since human rights legislation is "concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy - a healthy work environment." (D/4332, para, 33942.)

In Wei Fu (supra) it was suggested (at D/2801, para. 22926) that: "The approach of subsection 44(1) in expressly providing for vicarious liability is clearly consistent with, and facilitative of, the general public policy purposes of the Code." That comment, made in 1985, is understandable in the context of "fault" being the rationale for an employer's liability. The subsection would appear to have been intended to codify the practice of tribunals in holding employers vicariously liable for the acts of their employees done "in the course of employment", and harassment could hardly be regarded as conduct done in the course of employment as that phrase is understood in tort law. However, Robichaud indicates that "fault" is not the true principle underlying human

rights legislation. Curiously, as it turns out, not only was subsection 44(1) unnecessary in order to find corporate respondents liable for employee acts done in the course of employment other than harassment, but the only thing that its enactment may have accomplished is to shield such artificial entities from liability for an entire range of unacceptable conduct for which, but for that provision, they might now be held liable, thus relieving them from having to provide a totally "healthy work environment". In the context of current theory, subsection 44(1) appears to be quite incompatible with the now generally recognized purposes of human rights law. Unfortunately, however, that does not mean that it may be ignored.

The decision in Robichaud was rendered in the context of interpreting the words "in the course of employment" set out in a provision of the federal legislation. In concluding that "the statute contemplates the imposition of liability on employers for all acts of their employees", La Forest J. indicated that, as required by the Act, such acts would have to be "in the course of their employment". However, for the purposes of such legislation that phrase is to be given a much broader meaning than at common law, namely, "acts of employees that are in any way related to or associated with the employment." Thus, where an employee infringes any provisions of the Code other than 4.-(2), 6 and 43.-(1) the employer will be liable if the act of infringement was "in any way related to or was associated with the employment", regardless of what might have been the position at common law under the doctrine of vicarious liability. But if the infringing conduct was simply harassment it is not to be deemed to be an act of the employer even if it was in some way related to or associated with the employment. While in my opinion this points to a serious weakness in the Code, it follows that Levac Supply cannot be liable for the harassment of the complainant unless the "organic theory" of corporate responsibility applies.

Counsel for the Commission submitted that the facts of this case fall within the following situation set out in Wei Fu (supra) as the fourth of seven types of circumstances in which harassment by the employer might be found:

(4) Where the employer is a corporate entity, and an employee is in contravention of the Code, and that employee is part of the "directing mind" of the corporation, then the employer corporation is itself personally in contravention. The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility. ... For example, in another case under the former legislation, Dhillon v. F.W. Woolworth Co., Ltd. (1982), 3 C.H.R.R. D/206 where the management in a warehouse "knew, or should as reasonable men acting as management have known, that there was regular, and significant verbal racial harassment" and "did not take reasonable steps to put an end, or at least minimize, the racial abuse" the Respondent corporation was held to be in breach of the Code. (D/2801, para. 22922)


Having regard to the above passage it is quite apparent that the circumstances of the present case fall within the ambit of the "organic theory" of corporate responsibility. Indeed, as it was conceded that if Mr. Levac is liable for an infringement of the Code so, too, is the company, nothing more need be said in this regard. It follows, of course, that the declaration sought by counsel for Levac Supply pursuant to subsection 44(2) will not be made. In my opinion Mr. Levac's omission's and actions throughout were done with the authority and acquiescence of the corporate respondent and, while Mr. Robertson is not an officer or official of Levac Supply, his conduct was acquiesced in by Mr. Levac. Since the acts of a person who is a "directing mind" of an employer company are those of the company, and not merely acts "deemed" to be those of the corporate entity, Levac Supply must be held jointly and severally liable in respect of all the damages awarded, including those in respect of mental anguish.

ORDER

Having found the respondents Herb Robertson, Roger Levac and Levac Supply Ltd. to be in breach of sections 6.-(2) and 8 of the Human Rights Code, Statutes of Ontario, 1981, Chapter 53, as amended, and having found them to be jointly and severally liable for the losses arising out of the infringement of the complainant's right, it is hereby ordered as follows:

1. That the respondents Herb Robertson, Roger Levac and Levac Supply Ltd. pay to the complainant Ms. Carol Shaw the sum of \$43,273.00 as special damages.
2. That the respondents Herb Robertson, Roger Levac and Levac Supply Ltd. pay to the complainant Ms. Carol Shaw the sum of \$5,000.00 as general damages.

Dated this 30th day of October, 1990.



H.A. Hubbard, Chairman